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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

ERNEST E. ABRAMS, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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No. ———

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in this case on November 4, 1970.

OPINIONS BELOW

The opinion of the district court appears at 75 LRRM 2724 and is reproduced in the Appendix to this petition at App. 35-50.[1] The opinion of the Court of Appeals is reported at —— F.2d ——, 75 LRRM 2736 and is reproduced in the Appendix to this petition at App. 1-34.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1970. This Court has jurisdiction to review

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[1] The Appendix to this petition is separately paginated, and is referred to herein as "App."

the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. As a matter of federal law, what limitations period should be fashioned and/or applied to a claim against a labor union for breach of the duty of fair representation where such claim is included in a suit against an employer alleging an independent breach of contract under § 301 of the Labor Management Relations Act?

STATEMENT OF THE CASE

A. Introduction

It is a difficult task even to attempt to explain rationally the background events which produced the present status in this lawsuit. The events which gave rise to plaintiffs' original complaints involve a complex and hard fought labor relations dispute which occurred in 1959-1960.

Plaintiffs below are a group of approximately 225 employees formerly employed at the Carrier Corporation's Syracuse, New York plant. They filed suit for compensatory and punitive damages based upon the allegation that they lost their jobs during the course of the mentioned labor relations imbroglio in 1960 and have not been rehired to date. Notwithstanding the lapse of about eleven years since the relevant events in question, the instant proceeding is still at the pleading stage for reasons which we explain below.

Plaintiffs filed their original complaints on January 29, 1965, seeking a multi-million dollar recovery against three co-defendants—the Carrier Corporation,[2] the United Steelworkers of America, AFL-CIO,[3] and the Sheet Metal Workers' International Association, AFL-CIO and its Lo-

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[2] Hereinafter "Carrier" or "the Company."

[3] Hereinafter "the Steelworkers" or "the Union."

cal No. 527. The legal theories upon which the original complaints were predicated varied markedly *vis a vis* each of the named defendants. Suffice it to say at this juncture, on March 22, 1966, the district court conditionally dismissed the original complaints as "incomprehensible . . . and generally confusing" and violative of Rule 8, F. R. Civ. Proc.[4]

Thereafter, plaintiffs filed an amended complaint which the district court (by order dated January 6, 1967) held sufficiently comprehensible to withstand the defendants further motions to dismiss for failure to comply with Rule 8. The claims of wrongdoing against each defendant were set forth in the amended complaint essentially as follows:

> Claims against Carrier—(1) a § 301 claim for breach of a collective bargaining agreement allegedly in effect with Steelworkers; (2) ousting Steelworkers' Local 5895 as bargaining representative through a campaign of industrial warfare; (3) violations of the "Bill of Rights" provisions of the LMRDA[5]; (4) libel and slander; and (5) acting in concert with Sheet Metal Workers and its Local 527 to blacklist plaintiffs and thwart their employment opportunities.
>
> Claims against Steelworkers—(1) breach of the duty of fair representation; (2) § 301 claim for breach of contract allegedly embodied in the charter and by-

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[4] The portions of Rule 8 relevant to the district court's ruling are set forth in the App. at 35.

[5] Section 101, LMRDA, 29 U.S.C. §411, provides in relevant part as follows:

> (a)(1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

laws granted to Local 5895 by Steelworkers; (3) violation of plaintiffs' rights under LMRDA; and (4) aiding and abetting Carrier in the commission of unfair labor practices.

Claims against Sheet Metal Workers and Local 527 —(1) libel and slander; (2) blacklisting plaintiffs in attempt to thwart their employment opportunities; and (3) wrongful denial of membership in Local 527.

Each of the defendants then filed separate motions to dismiss the amended complaint essentially for failure to state any claim upon which relief could be granted against them. The district court granted each of the defendants' motions and ordered that the amended complaint be dismissed in its entirety. On appeal, the court below initially commented (App. 2):

> ". . . appellants have for the second time attempted to state one or more claims within the jurisdiction of this court in allegations which are conclusionary, vague, overlapping, and often contradictory . . . the [district] court, in the interest of finality, probed the pleadings in a futile effort to ascertain whether the plaintiffs were entitled to relief upon the facts as alleged and dismissed the complaint."

Notwithstanding its criticism of the calibre of plaintiffs' amended pleadings, the court below reversed the district court decision insofar as it had granted motions to dismiss filed by Carrier and the Steelworkers.[6] In so reversing, the court below remanded the case to district court and granted plaintiffs 30 days in which to file another amended complaint against the two remaining defendants.

Although the merits of plaintiffs' assertions in the amended complaint are not properly before the Court at this juncture, we feel constrained preliminarily to point out

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[6] The court below affirmed the district court's decision granting Sheet Metal Workers' motion to dismiss.

the novel and inherently illogical nature of plaintiffs' claim against Steelworkers. It goes without saying that labor organizations exist for the purpose of representing employees in collective bargaining: this is their lifeblood. Yet, at least insofar as Steelworkers is concerned plaintiffs have filed the instant multi-million dollar lawsuit with the ostensible purpose of establishing at trial that Steelworkers chose to forego its bargaining representative status for the production and maintenance employees at Carrier's plant *by conspiring* with Carrier and a rival union, Sheet Metal Workers, to plot our own demise and to substitute said rival as exclusive bargaining agent.

The factual allegations of the amended complaint which gave rise to this absurd claim against Steelworkers—and which for purposes of this petition we must necessarily accept at face value—are summarized below.

B. The Facts

Prior to the relevant time period herein, the employees of Carrier, including plaintiffs, were represented for several years by the Federal Labor Union No. 23893 ("FLU"), affiliated directly with the American Federation of Labor. FLU and Carrier entered into a three-year collective bargaining agreement effective September 4, 1956. Subsequent to the effective date of that agreement, the AFL and CIO merged and FLU No. 23983 continued in existence as a directly chartered local of the AFL-CIO. On or about June 21, 1959, the FLU membership voted to affiliate with an International Union of the AFL-CIO rather than remain as a directly chartered local.

The Steelworkers and Sheet Metal Workers, among others, campaigned for support of the FLU membership. The Internationals involved in this campaign entered into a written agreement providing, *inter alia*, that the AFL-CIO would conduct an election among the Carrier employees to determine which of the International Unions

they desired to affiliate with and, further, that after the election the defeated unions would not continue attempts to persuade the employees to affiliate with their Internationals. The election was conducted on or about July 1, 1959, and the FLU members decided by majority vote to affiliate with the Steelworkers.[7]

Nonetheless, Sheet Metal Workers continued to vie for support of the Carrier employees, and on January 7, 1960, an NLRB election was held, which was won by the Steelworkers, who were certified by the NLRB on January 15, 1960. As explained below, however, Sheet Metal Workers continued to vigorously pursue its organizational objectives.

In February, 1960, closely on the heels of its certification, Local 5895 submitted various proposals to Carrier, which the company denounced. About the same time, Carrier began scheduling an extraordinary amount of overtime work. When Local 5895's president refused to work overtime, he was suspended, and on the day after the suspension, March 3, 1960, Carrier shut down the operation, thus allegedly effectuating a "lockout." The Local 5895 members then picketed the premises.[8]

An agreement was tentatively reached on March 27, 1960, but it fell through when Carrier refused to reinstate the suspended Local 5895 president. Picketing continued until the middle of May, 1960, when Carrier advised that those employees still on strike should return to work or their jobs would be filled.

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[7] Thereafter, on October 2, 1959, Steelworkers International issued a charter designating the former FLU local as Local 5895, United Steelworkers of America, AFL-CIO.

[8] It is noteworthy that in reviewing an unfair labor practice decision by the NLRB involving the same facts as present here, this Court characterized the March 2, 1960 work stoppage as a "strike" called by Steelworkers after it "failed to agree [with Carrier] upon a collective bargaining contract." *United Steelworkers of America, AFL-CIO v. NLRB*, 376 U.S. 492, 493-494 (1964).

Plaintiffs did not return and they were replaced by Carrier. To date, Carrier has not permitted them to resume their employment and Carrier, along with Sheet Metal Workers, allegedly have "blacklisted" plaintiffs from all other employment opportunities in the Syracuse area.

As stated, Sheet Metal Workers continued throughout to campaign for support among the employees. This campaign ultimately proved successful, and on November 30, 1961, it was certified by the NLRB as exclusive bargaining representative. The Steelworkers withdrew as bargaining agent on that date. These events were described in plaintiffs' amended complaint as follows:

> "*. . . in abandoning plaintiffs and other remnants of Local Union 5895 on November 30, 1961, such abandonment being complete* and being a calculated and deliberate capitulation to the wanton, malicious and willful industrial warfare waged by Carrier Corporation and Sheet Metal International and Local Unions to oust Local 5895 as the collective bargaining representative of the production and maintenance workers of the Syracuse plant of Carrier Corporation." (Emphasis added).

Based upon these allegations of industrial relations intrigue, plaintiffs' amended complaint charged the Steelworkers with, among other things, a breach of the duty of fair representation. As characterized by the Second Circuit, the "claim is essentially that Steelworkers unjustifiably refused to try to enforce the rights provided for them in the labor contract with Carrier—in particular, the right not to be wrongfully discharged." (App. 28-29.)

The district court dismissed the fair representation claim on the ground that it was time-barred. It held that "[t]he duty of fair representation is a fiduciary obligation" and, in the absence of any federal limitations period, was time-

barred by the New York three-year statute of limitations governing actions based upon the breach of a fiduciary obligation.

The Second Circuit agreed that "[e]ven if the facts are assumed to be those most favorable to [plaintiffs], more than three years had elapsed before the suit was commenced."* However, the Second Circuit held that because of the "interrelated nature" between the union's alleged breach of the duty of fair representation and the employer's alleged breach of contract, the proper limitation period is the six-year New York period applicable to actions based upon contractual obligations. It stated (App. 30):

> We therefore hold that when a § 301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employees' grievance, the same period of limitations should be applied to both claims. In the present case, the proper limitation period to be applied to the contract claim against Carrier is the six-year limitation. . . . (Footnote omitted).

Consistent with this reasoning, the Second Circuit reversed the district court's dismissal of plaintiffs' fair representation claim.

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947 (hereinafter "the Act"), 61 Stat. 156, 29 U.S.C. § 185(a) provides as follows:

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*The district court found that plaintiffs' fair representation cause of action accrued, if at all, on November 30, 1961, at the latest, the date when Steelworkers allegedly completely abandoned plaintiffs and Sheet Metal Workers replaced Steelworkers as exclusive bargaining representative. As noted, plaintiffs' original complaint was not filed until January 29, 1965.

> "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 10(b) of the Act, 61 Stat. 146, 29 U.S.C. § 160(b), provides in relevant part as follows:

> ". . . no [unfair labor practice] complaint shall issue based upon any unfair labor practice charge occurring more than six months prior to the filing of the charge with the Board . . ."

REASONS FOR GRANTING THE WRIT

This case involves an important question of federal labor policy which was expressly left unanswered by this Court in *Auto Workers Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) and concerning which a conflict among the circuits recently has developed. The Second Circuit's instant opinion is directly contrary to *Figueroa de Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir., April 1, 1970).[9] We discuss the reasons for granting the writ *seriatim*.

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[9] On October 26, 1970, prior to the Second Circuit's decision in the the instant case, this Court denied the petition for a writ of certiorari filed by the employer in *Trabajadores Packinghouse*, — U.S. —, 39 U.S. Law Week 3180 (Oct. 27, 1970). Thereafter, the employers filed a Motion For Leave to File Second Petition for Rehearing and Brief In Support Thereof, urging, among other things, that in light of the conflict in circuits created by the instant decision this Court should reconsider its prior motion and grant its petition for a writ. That motion is pending before the Court. Of course, if it is granted then petitioner would request that the two cases be considered jointly.

I. AN IMPORTANT QUESTION OF FEDERAL LABOR POLICY IS PRESENTED HERE WHICH HAS NOT YET BEEN RESOLVED BY THIS COURT.

In *Hoosier Cardinal*, a labor organization filed suit under § 301 of the Act for damages, claiming that the company breached the collective bargaining agreement between the parties by refusing to make certain vacation payments provided by said agreement. The suit was filed seven years after the cause of action accrued. The Act is silent with respect to any limitations period, so the question presented in *Hoosier Cardinal* was what time bar, if any, was applicable.

Initially, this Court observed (383 U.S. at 701) that the question of the timeliness of § 301 suits, like all other legal issues attendant to § 301 actions, raises a federal question to be determined by applicable principles of federal law "which the courts must fashion from the policy of our national labor laws." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957).

In concluding that the timeliness of the union's § 301 suit in *Hoosier Cardinal* was governed, as a matter of federal law, by the six (6) year state statute of limitations for certain contract actions, the rationale of this Court is significant in three respects: (1) It turned essentially on the fact that the nature of the breach of contract action involved therein "closely resemble[d] an action for breach of contract cognizable at common law" (*Id.* at 705, n. 7); (2) It emphasized (*Id.* at 707) that in rejecting the twenty (20) year statutory period urged by the union it was acting consistent with the objective of the federal labor law to achieve rapid disposition of labor disputes; and (3) It expressly left unanswered the question whether in *other* § 301 actions the judiciary should devise a uniform time limitation to effectuate the federal labor policy or, alternatively, apply state limitations periods other than those governing pure contract actions.

> "Whether other § 301 suits different from the present one might call for application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question" (*Id.* at 705, n. 7).

As we shall explain below, the time is now ripe for this Court to address itself to this problem in the context present here. First, the nature of the instant action persuasively establishes that it is far different from the § 301 suit involved in *Hoosier Cardinal*. Here, plaintiffs consist of a group of employees who claim that the Company's lockout and subsequent refusal to rehire them, while it rehired other employees of lower seniority, constituted a discharge without cause and a loss of their seniority rights in violation of the collective bargaining agreement then allegedly in effect between the Steelworkers and the Company (see App. 8). Plaintiffs' breach of contract action *vis a vis* the employer is thus within the ambit of commonplace § 301 actions. See, for example, *Vaca* v. *Sipes*, 386 U.S. 171, 183-188 (1967); *Humphrey* v. *Moore*, 375 U.S. 335, 341-344 (1964).

However, in the same action plaintiffs also filed suit against the Steelworkers alleging, in essence, a breach of the duty of fair representation resulting from the bad faith refusal to try to enforce the rights provided plaintiffs in the collective bargaining agreement, as described above. With the introduction of this independent claim against Steelworkers the similarity between the instant § 301 suit and that present in *Hoosier Cardinal* vanishes. For plaintiffs' claim against Steelworkers is not grounded upon nor does it arise out of an alleged breach of contract; rather, it arises from a duty which this Court implied from and carved out of the federal statutes and imposed upon labor organizations over twenty years ago in a series of landmark cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway

Labor Act. See, for example, *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). Seen thereafter, that duty was extended to unions certified under the National Labor Relations Act. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1952); *Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1955). Sections 7 and 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 157 and 159(a), accorded to a union, selected by a majority of the employees in an appropriate unit for collective bargaining, a significant grant of power: to act as exclusive representative for all unit employees. To safeguard against the possibility that this statutory grant of power would be abused, this Court fashioned and imposed upon unions a corresponding duty—namely, to represent fairly all of the bargaining unit employees "without hostility or discrimination toward any [and] to exercise its discretion with complete good faith and honesty . . ." *Humphrey* v. *Moore*, *supra*, 375 U.S. at 342. See also, *Vaca* v. *Sipes*, 386 U.S. at 177. That duty applies not only to a union's function in negotiating a collective bargaining agreement but also to the application and enforcement of the resulting agreement. *Vaca* v. *Sipes*, *ibid.*

It is thus self-evident that plaintiffs' claim against Steelworkers is grounded on a federally created cause of action far removed from that present in *Hoosier Cardinal* which, as noted, "closely resemble[d] an action for breach of contract cognizable at common law" (383 U.S. at 705, n. 7). As the Third Circuit has aptly stated:

> ". . . this responsibility [of fair representation] arises out of the union-employee relationship and pervades it. It is not created by any contract between union and employer, although the bargaining for and the administration of such a contract may supply the content in which the obligation inherent in representa-

tive status controls the representative's conduct . . ." *Nedd* v. *United Mine Workers*, 400 F.2d 103, 105 (1968).

And the fact that plaintiffs' claim against the company for breach of contract remains a § 301 action for jurisdictional purposes even where, as here, the union is joined as co-defendant and charged with a breach of the duty of fair representation[11] does not alter the fundamental principle that they are two separate and discrete claims capable of separate vindication. *Czosek* v. *O'Mara*, 397 U.S. 25, 28 (1970).

In sum, then, the special nature of the instant § 301 action against the company and the union presents an appropriate vehicle for this Court to reach at least one of the timeliness issues it expressly left open in *Hoosier Cardinal*.

2. A CONFLICT BETWEEN THE CIRCUITS EXISTS WITH RESPECT TO THE PRECISE ISSUE PRESENTED HERE.

Perforce, this result is mandated in view of the clear conflict between the circuits which has recently developed with respect to the precise issue presented here. In *Trabajadores Packinghouse*, seven employees formerly employed by the Puerto Rico Telephone Company filed a § 301 suit against their employer and union. Simply put, their complaint against the employer rested on a pure breach of contract theory—*i.e.*, they allegedly were discharged without just cause in contravention of the seniority provisions of the collective bargaining agreement between the company and the union. In contrast, plaintiffs' claim against the union was that its "arbitrary and perfunctory handling of [their grievances]" (425 F.2d at 285)—which charged that their dis-

[11] *Vaca* v. *Sipes*, *supra*, 386 U.S. at 187; *Humphrey* v. *Moore*, 375 U.S. at 341-344. But see, Mr. Justice Goldberg's concurring opinion therein (*Id.* at 351-359).

charges violated the seniority provisions of the contract—constituted a breach of the duty of fair representation.

Without question, then, in *Trabajadores Packinghouse* the breach of the duty of fair representation claim arose in circumstances *identical* to those present here—namely, the union's alleged failure to perform its function in administering the grievance-arbitration procedure so as to protect the plaintiffs-employees unjustly discharged by their employer in violation of the collective bargaining agreement between the parties. Indeed, this extraordinary similarity is further highlighted by the fact that the union's alleged shortcoming in each case was its failure to press the seniority provisions of the respective agreements to obtain reinstatement for the plaintiffs.

In these circumstances, the Second Circuit's summary attempt (App. 30, n. 15) to distinguish *Trabajadores Packinghouse* on the grounds that there the union was *not* charged with refusing to enforce the employees' contract rights is totally unavailing. As explained above, nothing could be more plain than that this is precisely what the union was being charged with in *Trabajadores Packinghouse*.

It is equally apparent that the legal analysis relied upon by these two courts is in direct conflict. In *Trabajadores Packinghouse* the First Circuit expressly rejected the employees' claim that the same statute of limitations should govern both the breach of contract claim against it and the fair representation claim against the union. In so doing, it emphasized: that the union's duty of fair representation to those it represents is not a "contractual" duty but rather is more closely analogous to a duty normally associated with tort actions; that the two claims are clearly separable—one arising out of federal statute and the other from the collective bargaining agreement—and will be determined on the basis of "different evidence and legal argument"; and that to apply a contract statute of limitations

merely because the claim against the union appears in a § 301 complaint would produce an unworkable result—"in a given state the employee's suit against his union for 'unfair representation' would be subject to a different statute of limitations depending on whether the employee had joined his employer in the same lawsuit."[13] (425 F.2d at 285-287).

Finally, while recognizing—consistent with the teachings of *Vaca* and *Republic Steel* v. *Maddox*[14]—that the employee will be required to show, as a prerequisite to his § 301 suit against the employer, that he was prevented from exhausting his remedies under the grievance-arbitration procedure by the union's unfair representation, the First Circuit stated (*Id.* at 286-287):

> ". . . . nothing [in the above cited cases] requires that the union actually be *liable* for such breach. Indeed, an employee could sue his employer under § 301 and overcome the 'exhaustion' defense by showing wrongful prevention by the union *without ever formally joining the union in that suit.*" (Emphasis added).

Based on the foregoing analysis, the First Circuit concluded that the plaintiffs' action against the union was properly characterized as a tort action and therefore barred by the applicable one year limitation period under Puerto Rican law.[15]

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[13] In *Vaca* v. *Sipes*, *supra*, plaintiff filed separate suit against the union (fair representation) and the employer (breach of contract whereas in *Humphrey* v. *Moore*, *supra*, plaintiffs joined both the company and the union as defendants. *Cf. Czosek* v. *O'Mara*, *supra*.

[14] 379 U.S. 650 (1965).

[15] Notwithstanding the fact that the union was immunized from any liability because of the statute of limitations, the First Circuit held that proof of the union's breach of fair representation was an essential element in plaintiff's successful prosecution of its breach of contract claim against the company which led to a damage award for lost earnings.

The analysis of the Second Circuit in the instant case is diametrically opposite to that in *Trabajadores Packinghouse*. Little need be added to the express holding of the court below (App. 28-30):

> "In the present case appellants' claim is essentially that Steelworkers unjustifiably refused to try to enforce the rights provided for them in the labor contract with Carrier—in particular, the right not to be wrongfully discharged. The duty of the union to its members in this regard is tied to the contractual obligations of Carrier to the union as representative of the employees and therefore resembles right-duty relationships between contracting parties, where one is bound to use good faith or its best efforts on behalf of the other. Thus the unfair representation claim against Steelworkers in this court is intimately related to the § 301 claim against Carrier since both stem from the unauthorized discharge of the appellants contrary to the terms of the labor agreement. Even though these are two distinct rights capable of separate vindication, see *Czosek* v. *O'Mara*, *supra*, because of their interrelated nature, it would seem appropriate to apply the same limitation period to both claims. . . .
>
> "We therefore hold that when a § 301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employee's grievance, the same period of limitations should be applied to both claims. In the present case, the proper limitation period to be applied to the contract claim against Carrier is the six-year limitation set out in N.Y. CPLR § 213(2) for 'an action upon a contractual obligation or liability express or implied'." (Footnote omitted).

Without belaboring the obvious a conflict between circuits is thus present. Moreover, a pressing need exists for resolution by this Court precisely because of the increasing number of employees filing § 301 suits against employers (which sound in breach of contract) wherein unions have been joined as party defendants and charged with unfair representation based upon alleged bad faith handling of grievances designed to protect the employees' contract rights.[15]

It is not the purpose of this petition to expound upon the pitfalls of the Second Circuit's instant opinion. We would only point out briefly some of them. In an attempt to achieve "uniformity" by applying the state statute of limitations for contract actions to the plaintiffs' duty of fair representation claim as well, the court below did violence to the prior holdings of this Court in *Vaca* and *Czosek, supra*, which emphasized the separate and distinct nature of claims against an employer to enforce a contractual commitment contained in a collective bargaining agreement and against a union for breach of its federal statutory duty of fair representation.

Likewise, the court below failed to pay proper heed to the fundamental principle of our national labor policy of

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[15] *Simberlund* v. *Long Island RR Co.*, 421 F.2d 1219 (2nd Cir., 1970); *Gray* v. *Asbestos Workers*, 416 F.2d 313 (6th Cir., 1969); *Brady* v. *Trans World Airlines, Inc.*, 401 F.2d 87, 104 (3rd Cir., 1969), cert. denied 393 U.S. 1048; *Bialowski* v. *UAW*, 372 F.2d 829, 835 (6th Cir., 1967); *Acuff* v. *United Papermakers and Paperworkers*, 404 F.2d 169 (5th Cir., 1968), cert. denied, 394 U.S. 987; *ILA* v. *Kuntz*, 334 F.2d 165, 170-171 (9th Cir., 1964); *Hardcastle* v. *Western Greyhound Lines*, 303 F.2d 182, 185 (9th Cir., 1962), cert. denied, 371 U.S. 920; *Gainey* v. *Brotherhood of Railway Employees*, 313 F.2d 318, 325 (3rd Cir., 1963); *Cunningham* v. *Erie RR Co.*, 266 F.2d 411, 417 (2nd Cir., 1959); *Turley* v. *Hall's Motor Transit Co.*, 296 F. Supp. 1183 (M.D. Pa., 1969); *Ferrara* v. *Pacific Intermountain Express Co.*, 301 F. Supp. 1240 (N.D. Ill., 1969); *Hohlweiler* v. *Pennsylvania RR Co.*, 294 F. Supp. 1377 (E.D. Pa., 1969).

encouraging the speedy resolution of labor disputes. *Auto Workers* v. *Hoosier Cardinal, supra*, 383 U.S. at 707. Indeed, the implications of the Second Circuit's ruling are much more disturbing than the actual result of the instant case. For while the New York limitations period for contract actions is six years, many other states have limitations periods extending from 10 to as many as 20 years for comparable actions.[18] Of course, there is little to commend a rule which extends the limitations period to that inordinate degree even if it does enhance "uniformity." *Cf. Auto Workers* v. *Hoosier Cardinal, supra*, at 707, n. 9. Conversely, if this Court would not apply those state limitations periods for contract actions which in its judgment are excessive then, by definition, the objective of "uniformity" is of dubious validity in this entire subject area.

Next, the court below stressed the need for uniformity apparently in the mistaken belief that damages should be apportioned equally between the employer and union in the instant kind of § 301 suit and, accordingly, to insure this result each must be subject to the same statute of limitations. Plainly, however, this analysis overlooks the very limited nature of the Union's liability in such actions, as explained by this Court in *Vaca, supra*, at 196-198; and *Czosek* v. *O'Mara, supra*, at 29.

Lastly, the Second Circuit's decision completely fails to come to grips with the practical reasons aptly articulated in *Trabajadores Packinghouse*—which militate against permitting the desire for "uniformity" to govern the determination of the state limitations period to apply. See discussion *supra* at pp. 14-15.

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[18] See the statute of limitations chart set forth as Appendix G to the petition for a writ of certiorari filed by Puerto Rico Telephone Company in the companion *Trabajadores Packinghouse* case discussed above (No. 285, October Term, 1970).

3. REVIEW IS WARRANTED SO THIS COURT CAN DETERMINE WHETHER, IN VIEW OF THE SPECIAL NATURE OF THE INSTANT TRIPARTITE § 301 ACTION, IT SHOULD FASHION A LIMITATIONS PERIOD FROM THE NATIONAL LABOR POLICY TO FILL THE GAP LEFT BY CONGRESS.

In addition to the foregoing, review is warranted here so that this Court can determine whether, in view of the special nature of the instant tripartite § 301 action, it should fashion a limitations period from the national labor policy to fill the gap left by Congress. That possibility was not foreclosed by *Hoosier Cardinal*. The Court merely held that "so bold a form of judicial inventiveness" (*Id.* at 701) was not necessary *there* because the particular § 301 suit under scrutiny so closely resembled a traditional breach of contract action cognizable under the common law that it was appropriate to determine its timeliness by applying the state limitations period for contract actions. Indeed, the Court recognized that "there are problems so vital to the implementation of federal labor policy that they will command a high degree of inventiveness from the courts" (*ibid*).

We would respectfully suggest that the problem posed by the instant case is one which calls for this precise treatment, notwithstanding the refusal of the court below to embark upon that course. There are compelling reasons why this Court should fashion a federal limitations period coterminous with the six month period governing the timeliness of unfair labor practices under Section 10(b) of the Act (quoted at p. 9, *supra*).

There is no general statute of limitations applicable to all federally created rights. Accordingly, where a federal statute creates federal rights—such as the right to be represented fairly—the initial inquiry is to determine whether Congress expressly placed a time limit for enforcing the

particular right it established. Where such a Congressional time limit appears it is controlling. See, *Holmberg* v. *Armbrecht*, 327 U.S. 395 (1946); *Campbell* v. *Haverhill*, 155 U.S. 610 (1895); *Cope* v. *Anderson*, 331 U.S. 461 (1947); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U.S. 390 (1906); *Rawlings* v. *Ray*, 312 U.S. 96 (1941).

"The rub comes when Congress is silent." *Holmberg* v. *Armbrecht*, *supra*, 327 U.S. at 395. In such circumstances, filling the void is left to "judicial implications." *Ibid.* In performing this task, the federal courts, as a general practice, have interpreted the silence of Congress to mean that they should apply the state statute of limitations governing the cause of action most nearly analogous to the particular federally created right involved rather than as an invitation to "create" their own time periods.

However, there is nothing sacrosanct about state law. The *fact* that federal courts frequently have resorted to state limitations laws is of less consequence here than the *rationale* underlying the decision to do so. Simply stated, it is that the state limitations periods are applied as a stopgap measure since they constitute the most feasible means of supplementing and effectuating federal policy. See, for example, *Board of County Commissioners* v. *U.S.*, 308 U.S. 343, 350-352 (1939); *Holmberg* v. *Armbrecht*, *supra*, 327 U.S. at 394-395; *U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 709 (1966) (Mr. Justice White, dissenting in an opinion joined by Mr. Justices Douglas and Brennan). The silence of Congress should not be read as automatically placing an imprimatur on resort to state law.

The ultimate goal of the judicial inquiry is to divine and apply the limitations period which comports with federal policy. The *Holmberg*, *Campbell*, *Cope* line of cases cited above are not inconsistent with this basic theme. Indeed, in those cases this Court applied state statutes of limitations "by default" simply because no satisfactory alternatives ex-

isted. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 229 (1958) (Mr. Justice Brennan, concurring)."[17]

Here, in marked contrast, no such default is necessary since this Court can look to Section 10(b) of the Labor Act as a guiding beacon and fashion its own equivalent federal limitations period. First, a breach of the duty of fair representation not only gives rise to a federal cause of action enforcible in court, it likewise has been held to be an unfair labor practice under Section 8(b)(1)(A)[18] of the Labor Act. See, for example *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enf't denied on other grounds 326 F.2d 172 (2nd Cir., 1963); *Local 12, United Rubber Workers*, 150 N.L.R.B. 312 (1964), aff'd 368 F.2d 12 (1966), cert. denied, 389 U.S. 837; *Independent Metal Workers Union (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964); *IUE, Local 485 (Automotive Plating Co.)*, 170 N.L.R.B. No. 121 (1968)."[19] Even more to the point, the "right" sought to be enforced, whether before an administrative tribunal (N.L.R.B.) or in court, derives from identical provisions of the same statute—Sections 7 and 9(a) of the Labor Act. Consequently, it comes as no surprise that the same general

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[17] Given the absence of any Congressionally imposed limitations periods in the statutes involved in those cases, the Supreme Court had four (4) choices—either to apply: "(1) No period of limitations at all; (2) an arbitrary period applicable in all cases; (3) the flexible but uncertain doctrine of *laches*; and (4) state statutes of limitations." *Id.* at 229.

[18] Section 8(b)(1)(A), 29 U.S.C. § 158(b), provides that it shall be an unfair labor practice for a labor organization or its agents "to restrain or coerce employees in the exercise of the rights guaranteed in section 7."

[19] Although Section 8(b) was enacted in 1947 the NLRB did not interpret a breach of a union's duty of fair representation as an unfair labor practice until *Miranda Fuel, supra.* In *Vaca* this Court expressly reserved on this question, holding that even assuming the Board was correct this was not an area of the law preempted exclusively to the Board's jurisdiction. But see, *Truck Drivers and Helpers Local 568* v. *NLRB*, 379 F.2d 137, 140-142 (D.C. Cir., 1969).

standard developed by the courts for determining whether a union's conduct satisfied its duty of fair representation likewise has now been "adopted and applied" by the NLRB in exercising unfair labor practice jurisdiction over this same subject matter. *Vaca* v. *Sipes*, *supra*, 386 U.S. at 181.

Common elements of extraordinary dimensions thus link Board and court proceedings to enforce this duty. Indeed, these common elements have been meshed in plaintiffs' amended complaint—not only have plaintiffs alleged a violation of federal law based upon breach of the duty of fair representation, they have also alleged, albeit in somewhat cloudy terms, that the same misconduct constitutes an unfair labor practice (App. 6, 41).

The six month limitation period applies to all unfair labor practice proceedings. Accordingly, to foreclose the possibility of an anomolous situation whereby two tribunals would apply *different* limitations periods in actions to enforce the *identical* right, this Court should fashion a federal period of equal duration.[20] Otherwise, the legal standard

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[20] *Cf.* the First Court's reasoning in rejecting the 10(b) argument in *Trabajadores Packinghouse*, *supra*, at 287 and *Falsetti* v. *Local Union 2026, UMW*, 355 F.2d 658, 661-662 (2nd Cir., 1966) (*dictum*).

Also, *cf. International Union of Operating Engineers* v. *Fishbach and Moore, Inc.*, 350 F.2d 936 (9th Cir., 1965), *cert. denied*, 384 U.S. 904. That case raised the question of the appropriate limitations period to be applied in suits for money damages brought in district court under section § 303 of the Labor Management Relations Act, 29 U.S.C. § 187. Because that section created a right to sue based on injury to an individual's business or property resulting from an unfair labor practice (a secondary boycott under 8(b) (4) (B) of the Labor Act) the Ninth Circuit observed that "[t]here are strong reasons for application of a six-month period borrowed from § 10(b) . . . . We think it is neither logical, nor just, nor in keeping with the policy which Congress has thus far articulated in the field of labor relations that a six month period shall limit the filing of a complaint with the Board and some different period . . . shall operate to limit the time for commencing a suit for damages under § 303 based on the same alleged unfair labor practice." *Id.* at 937-938. Notwith-

for assessing this obligation will be uniform but the enforcement of it will be subject to diverse rules on time limits depending upon the forum selected.

Next, the Congressional policies underlying the imposition of a short, six month limitations period—most particularly the desire to encourage speedy resolution of labor disputes[21]—are equally relevant here. The same can be said of the attendant policies of 10(b) to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere and recollections of the events in question have become dim and confused, H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships" *Local Lodge No. 1424, Machinists* v. *N.L.R.B.*, 362 U.S. 411, 419 (1960).

Important practical reasons, as illustrated by the instant case against Steelworkers, buttress the need for a short limitations period in fair representation suits. The serious allegations leveled against Steelworkers scattered throughout numerous pages in the amended complaint (App. 42, 58-59)—charges of *conspiring* with the Carrier Corporation and Sheet Metal Workers Union, charges of intentionally abdicating the interests of the Carrier employees whom it represented, charges of failing to perform its statutory obligation to serve as exclusive bargaining agent—all cry out for prompt and expeditious disposition. Yet, plaintiffs' own delinquency foreclosed any such possibility. The amended complaint was not filed until January 29, 1965—more than three years after the Steelworkers, by plaintiffs' own assertation (App. 57) "complete[ly] abandon[ed]" them and

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standing these considerations, the Court concluded that the silence of Congress in not expressly setting forth a limitations period in § 303 should be filled by resorting to a state statute rather than "judicial legislation" (*Id.* at 939).

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[21] See, for example, *U.A.W.* v. *Hoosier Cardinal Corp.*, *supra*, 383 U.S. at 707; *I.A.M.* v. *Geometric Tool Co.*, 406 F.2d 284 (2nd Cir., 1968).

more than five and a half years (5½) after the conspiracies began according to plaintiffs (App. 59). As such, any trial at this very late date concerning the complex, entangled industrial relations milieu portrayed throughout plaintiffs' lengthy amended complaint would undoubtedly suffer from the same defects—i.e., missing witnesses, faded memories—that 10(b) was designed to eliminate.[20] Indeed, if ever there was a "stale" claim that is what currently remains of plaintiffs' lawsuit.

Apart from the particular facts in this case, the realities of industrial life dictate that allegations of breach of the duty of fair representation *in general* should be resolved with dispatch. The relationship between a union and the employees it represents is unique in that there is a continuing day-to-day relationship to be maintained. Notwithstanding the pendency of a lawsuit predicated on a breach of fair representation theory, a union normally must continue to provide numerous services for the employees it represents. Obviously, many practical reasons exist for "clearing the air" in that relationship by encouraging the speedy resolution of any internal disputes resulting from the dissatisfaction of any employees with the manner in which their representative performs its statutory duty. Indeed, it is entirely possible that by permitting this kind of situation to fester the impact will go far beyond disrupting the union's internal affairs. It may likewise seriously impede the normal relationship between the company and union. To illustrate, if any long term cloud is cast on the union's willingness to represent all the employees fairly this could well interfere with the union's ability to negotiate with the

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[20] "There comes a time when the defendant ought to be secure in his reasonable expectation that the slate has been wiped clean of past obligations and he ought not be called upon to resist a claim when "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944).

company and administer the collective bargaining agreement.

So, too, the parties to most collective bargaining agreements have recognized the necessity of protecting against the real possibility that industrial strife will result unless day-to-day grievances arising in the plant are resolved promptly. To insure against processing of stale claims and any adverse effects from lingering dissatisfaction of the employees, collective bargaining agreements commonly provide a self-imposed limitation of thirty (30) days or less on the filing of grievances. Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, par 51:81 (1969).

In our judgment, the foregoing arguments, singularly and collectively, warrant the fashioning of a six month federal limitations period for duty of fair representation suits. Understandably, courts may be reluctant to "create" statutes of limitations in certain circumstances,[22] especially where they can "borrow" a state limitations period which already governs related actions. But any such reluctance would be ill-conceived here: first, as explained, there is really nothing to "create"; second, the Steelworkers' quest comports with the extraordinary extent to which "judicial inventiveness" (*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457) has already been exercised in suits arising under § 301. Fashioning a limitation period here is but one strand of a comprehensive web of federal law which the courts have already shaped. Since the duty of fair representation was fashioned initially by the Supreme Court it would be equally appropriate for the judiciary to fill the gap it created by fashioning a uniform limitations period consistent with federal labor policy.

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[22] But *cf.* the instances where common law courts have established limitations periods as discussed by Mr. Justice White, dissenting in *UAW v. Hoosier Cardinal Corp.*, *supra*, 383 U.S. at 713.

In sum, this petition should be granted so this Court can determine whether: (1) in view of the special nature of the instant tripartite § 301 action it should fashion a uniform limitations period applicable to the fair representation claim against the union consistent with the federal labor policy; (2) or, alternatively, it desires to stay its hand and merely apply separate state statute of limitations to the separate claims against the employer (breach of contract) and the union (breach of the duty of fair representation); (3) or, instead, to apply the same state limitations period to each of those claims where combined in one action and, if so, which one should be applied.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be granted.

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UNITED STATES COURT OF APPEALS
For the Second Circuit

ABRAMS, et al v. THE CARRIER CORPORATION, et al., No. 408, November 4, 1970

Before:

WATERMAN AND ANDERSON, *Circuit Judges*, and BARTELS, *District Judge.**

BARTELS, District Judge:—Plaintiffs appeal from an order of the United States District Court for the Northern District of New York (Port, J.) dismissing their amended complaint against all the defendants, principally upon the grounds of lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted.

Jurisdiction is alleged under Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, and Section 102 of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 412.[1]

Appellants are approximately 225 former employees of Carrier Corporation ("Carrier") at its Syracuse, N.Y. plant, who lost their jobs as a result of a labor relations imbroglio which began in the summer of 1959 and lasted beyond November 30, 1961. They lost their jobs as a conse-

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* Of the Eastern District of New York, sitting by designation.

[1] Section 301 of the LMRA provides in pertinent part:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 102 of the LMRDA provides in pertinent part:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

Plaintiffs originally invoked federal jurisdiction under 28 U.S.C. § 1332 as well, but abandoned this contention, conceding the absence of diversity. See *United Steelworkers of America, AFL-CIO* v. *Bouligny*, 382 U.S. 145, 60 LRRM 2393 (1965).

quence of a work stoppage (claimed by them to be a lockout) and picketing of the plant in connection with certain proposals made by Local Union No. 5895 of the United Steelworkers of America, AFL-CIO ("Steelworkers") and the scheduling of overtime work which resulted in, among other things, the suspension of Francis Brewster, the president of Local 5895. They were not reemployed by Carrier after the picketing ended although other employees of lesser seniority, who also picketed, were recalled to work. At various times during this period, three labor unions, Federal Labor Union No. 23983, affiliated with AFL-CIO ("FLU"), Local 5895 of Steelworkers, and Local 527 of Sheet Metal Workers' International Association, AFL-CIO ("Sheet Metal Workers"), represented Carriers production and maintenance employees.

Upon these basic facts, appellants have for the second time attempted to state one or more claims within the jurisdiction of this court in allegations which are conclusory, vague, overlapping, and often contradictory. The district court, having dismissed the first complaint under Rule 8, Fed. R.Civ.Proc., 28 U.S.C., refused to dismiss the present complaint for the same reason, upon the ground that the allegations were sufficient to enable the defendants to file a responsive pleading. Instead, the court, in the interest of finality, probed the pleadings in a futile effort to ascertain whether the plaintiffs were entitled to relief upon the facts alleged and dismissed the complaint. We believe the interests of judicial economy might have been better served had this complaint also been dismissed as a plain violation of the explicit requirements of Rule 8, with leave to amend.[1] *See Woody* v. *Sterling Aluminum Products, Incorporated*, 365 F.2d 448, 63 LRRM 2087 (8th Cir. 1966), cert. denied, 386 U.S. 957, 64 LRRM 2574 (1967); *Koll* v. *Way-*

[1] In that event, there would have been no appeal to this court. *Dann* v. *Studebaker-Packard Corporation*, 288 F.2d 201 (6th Cir. 1958); *Koll* v. *Wayzata State Bank*, 397 F.2d 124 (8th Cir., 1968).

zata State Bank, 397 F.2d 124 (8th Cir. 1968). In setting aside the district court's disposition of this case, we have been mindful of our obligation, particularly in cases in the labor relations field, to construe the complaint most liberally in favor of the plaintiffs. *Desrosiers* v. *American Cyanamid Company*, 377 F.2d 864, 65 LRRM 2557 (2d Cir. 1967); *Local 33, International Hod Carriers Building and Common Laborers' Union of America* v. *Mason Tenders District Council of Greater New York*, 291 F.2d 496, 48 LRRM 2388 (2d Cir. 1961). See also *Murray* v. *City of Milford, Connecticut*, 380 F.2d 468 (2d Cir. 1967); *Escalera* v. *New York City Housing Authority*, Slip Op. Nos. 33226-9, 2d Cir., April 29, 1970, 425 F.2d 853.

The complaint is cast in the form of allegations of fact followed by a series of separate claims for wrongdoing against each defendant purportedly predicated upon those facts, which claims require separate treatment. The factual allegations may be briefly summarized as follows:

Facts

In 1956 appellants, former employees of Carrier, were represented by FLU, which entered into a collective bargaining agreement (hereafter referred to as "bargaining agreement") with Carrier, effective September 4, 1956, for a period of three years. By its terms this agreement (Section XXII) was subject to automatic extension for successive periods of three years each "* * * unless either party gives written notice of termination to the other party at least sixty (60) days before the end of such contract period." No such notice was ever given by either party.

On June 21, 1959, the membership of FLU voted at a special meeting to affiliate with an AFL-CIO international union, as a result of which a number of Internationals, including Steelworkers and Sheet Metal Workers, attempted to enlist the affiliation of the FLU membership. Thereafter an agreement was entered into among the international

unions providing that the other Internationals would not intervene or be a party to any National Labor Relations Board ("NLRB") election in such bargaining unit after the FLU membership had voted for affiliation with a particular International. Subsequently, on July 1, 1959, the FLU membership voted to affiliate with Steelworkers and on October 2, 1959 a charter was issued by Steelworkers to FLU designating it as Local Union 5895, which charter appellants claim constituted a contract. Contrary to the agreement, the Sheet Metal Workers agitated for affiliation with the FLU membership which culminated in Sheet Metal Workers' and Local 527's entrance into a NLRB election held on January 7, 1960, which was won, however, by Local 5895. Accordingly, on January 15, 1960, Local 5895 was certified as "successor collective bargaining representative under the agreement entitled 'Agreement Between Carrier Corporation and AFL, Federal Union No. 23983.'" A disagreement between Carrier and Local 5895 arose in February, 1960, when Carrier entered into some sort of "campaign", pursuant to which "various proposals of the Local Union 5895" were denounced. When an extraordinary amount of overtime work was scheduled, Local 5895 voted to refuse to work overtime and to walk out if any member was disciplined for this refusal, it being claimed that Carrier was preparing for a strike or a lockout. Subsequently, on March 2, 1960, Francis Brewster was reprimanded and suspended by Carrier. On March 3, 1960, Carrier shut down its plants and thus effectuated a "lockout", which resulted in picketing on the same day by Local 5895.[3]

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[3] In reviewing a decision by the National Labor Relations Board involving the same facts presented here, the Supreme Court characterized the March 2, 1960 work stoppage as a "strike" called by Steelworkers after it "failed to agree [with Carrier] upon a collective bargaining contract." *United Steelworkers of America, AFL-CIO* v. *National Labor Relations Board*, 376 U.S. 492, 493-4, 55 LRRM 2608 (1964). This characterization, based upon NLRB findings, however, is not binding upon these plaintiffs. *Cf. International Union of Elec-*

Later, on March 27, 1960, an agreement was reached between Local 5895 and Carrier to end the work stoppage, but this agreement was torpedoed by another dispute arising out of the announcement by Carrier that Francis Brewster would not be permitted to return to work, whereupon picketing was resumed by Local 5895. Although Carrier announced on March 28, 1960 that it would reemploy all those who wished to return to work, approximately 400-500 members (including appellants) of Local 5895 continued to picket until the middle of May, 1960. Notwithstanding a subsequent announcement by Carrier that the persons still "out on strike" should return to work, Carrier refused to allow appellants to resume employment on an equal footing with other employees and has failed to accord the appellants the rights and privileges enjoyed by them pursuant to the bargaining agreement and, accordingly, appellants have been without work since that date and have been barred from employment at Carrier's Syracuse plant although other employees of Carrier, in the same occupations but of lesser seniority, have been recalled to work.

In the meantime, Sheet Metal Workers campaigned for support among the employees with the assistance of Carrier, which culminated in a certification, on November 30, 1961, by the NLRB of Local 527 of Sheet Metal Workers as the collective bargaining agent of Carrier's employees, whereupon Steelworkers "withdrew" as appellants' representative and refused to intercede on their behalf. Moreover, Local 527 unjustifiably refused appellants membership and seniority rights based upon their employment history and their membership in Local 5895.

The claims of wrongdoing against each defendant are set forth in the complaint as follows:

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trical, Radio and Machine Workers, AFL-CIO v. *General Electric Company*, 407 F.2d 253, 264, 70 LRRM 2082 (2d Cir. 1968), cert. denied, 395 U.S. 904, 71 LRRM 2254 (1969).

Claims Against Carrier

(1) Breach of the bargaining agreement under § 301; (2) ousting Local 5895 as the bargaining representative through a campaign of industrial warfare resulting in the withdrawal of Local 5895's charter on November 30, 1961; (3) libel and slander of appellants; (4) violation of appellants' rights under the "Bill of Rights" provisions of the LMRDA; and (5) acting in concert with Sheet Metal Workers and Local 527 to blacklist appellants to thwart their employment from May, 1960 on.

Claims Against Steelworkers

(1) Breach of contract, embodied in the charter and by-laws granted to Local 5895 by Steelworkers under § 301, in that Steelworkers failed to represent appellants diligently, fairly, and in good faith in proceedings before the court and the NLRB arising out of the industrial strife precipitated by the March 2, 1960 lockout by Carrier, and failed to afford to the Local 5895 membership the benefits of the funds available to the International Union to assist local unions in their industrial problems with management, and abandoned appellants and other members of Local 5895 as the collective bargaining representative of the production and maintenance workers; (2) violation of appellants' rights under the LMRDA; (3) aiding and abetting Carrier in the commission of unfair labor practices within the meaning of § 8 of the National Labor Relations Act, 29 U.S.C. § 158; and (4) breach of Steelworkers' duty of fair representation.

Claims Against Sheet Metal Workers and Local 527

(1) Breach of the "Agreement Among the Internationals" under § 301; (2) libel and slander of appellants; (3) blacklisting appellants to thwart their employment from May, 1960 on; (4) malicious interference with ap-

pellants' property rights in a campaign of industrial warfare in concert with Carrier for appellants' loyalty to Local 5895; and (5) wrongful denial of membership in Local 527 (charged in the chronology of events but not under the heading of "wrongdoing").

Claims Against All Defendants

(1) Conspiracy to commit the above wrongs and interferences with appellants' rights charged substantively against the various defendants, and (2) deliberate ouster of appellants from union membership and job employment.

Relief

Relief is sought in the form of (1) actual damages of $25,000,000 and punitive damages of $50,000,000; (2) an injunction enjoining defendants from continuing to commit the alleged wrongs and ordering defendants Carrier and Local 527 to reinstate appellants in their jobs, along with seniority rights and membership in Local 527; (3) back pay of over $9,000,000 from March 2, 1960; and (4) payment by Steelworkers of benefits appellants should have received in protecting the rights of Local 5895 and in attempting to redress the wrongs ensuing from the lockout and other alleged misconduct.

On this appeal we are called upon to determine whether the complaint states a claim upon which relief can be granted within the jurisdiction of this court as to (a) claims against all the defendants under § 301 of the LMRA; (b) claims against Carrier and Steelworkers under §§ 101 et seq. of the LMRDA; (c) claims against Steelworkers for violation of the duty of fair representation; (d) claims arguably subject to § 7 or § 8 of the National Labor Relations Act ("NLRA") against all the defendants; (e) conspiracy against all the defendants; and (f) pendent State claims. These claims will be considered seriatim.

§ 301 Claim Against Carrier

Appellants allege that the bargaining agreement, effective September 4, 1956, was extended for a three-year period after September 30, 1959, because no notice of termination had been given by Carrier, and further allege that "Carrier Corporation deliberately and maliciously breached the Collective Bargaining Agreement to the damage of the plaintiffs." In their brief, they assert that certain specified allegations in the complaint[4] set forth a breach of contract, which appellants claim relate to denial of rights under the contract of employment, lockout, denial of work opportunity, suspensions in violation of the contract, replacing appellants as employees of Carrier and blackballing. The district court found that the complaint was insufficient because these allegations failed to point out exactly how the contract was violated or which contract provisions were breached. We cannot agree with this conclusion. The appellants attached to the complaint a copy of the bargaining agreement and it is true that no specific provisions of the bargaining agreement were invoked in the complaint. But the appellants did plead a breach of the bargaining agreement which, when viewed with the other allegations of the complaint and the provisions of the agreement, precludes a dismissal of the complaint for lack of specificity. Liberally construed the complaint essentially alleges, however inartistically, that Carrier's lockout and subsequent refusal to rehire appellants, while it rehired other employees of lesser seniority, constituted a discharge without cause, a discrimination against appellants on account of their support of Local 5895, and a loss of their seniority rights, all in violation of the bargaining agreement. *Cf. O'Mara* v. *Erie Lackawanna Railroad Company*, 407 F.2d 674, 70 LRRM 2873 (2d Cir. 1969), affirmed sub nom., *Czosek* v. *O'Mara*, 397

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[4] Paragraphs VII (g) (q) (t) (v) (x) (dd) (ff) (gg) (hh) and the entirety of paragraph VIII.

U.S. 25, 73 LRRM 2481 (1970).[5] We find that the specific provisions of the bargaining agreement may well be construed as prohibiting such conduct.[6] *Cf. International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *General Electric Company*, 407 F.2d 253, 264, 70 LRRM 2082 (2d Cir. 1968), cert denied, 395 U.S. 904, 71 LRRM 2254 (1969); *Anaconda Company* v. *Great Falls Mill and Smeltermen's Union No. 16 of The International Union of Mine, Mill and Smelterworkers*, 407 F.2d 749, 69 LRRM 2597 (9th Cir. 1968). "To require a plaintiff to set out each and every contractual fact and contention in detail before federal jurisdiction would attach under § 301 would be unreasonable and unwarranted in light of the purpose underlying § 301 and the function of the complaint in federal pleading." *Chase* v. *Progress Manufacturing Company*, 382 F.2d 773, 777, 66 LRRM 2163 (3d Cir. 1967). Moreover, a complaint should not be dismissed unless it appears to a certainty that no set of facts could be proven at trial entitling a plaintiff to any relief. *Jenkins* v. *McKeithen*, 395 U.S. 411, 422, 71 LRRM 2385 (1969); *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 41 LRRM 2089 (1957); *Dann* v. *Studebaker-Packard Corporation*, 288

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[5] In *O'Mara*, former employees of the Lackawanna Railroad alleged a breach of an "Implementing Agreement" between the newly-formed Erie Lackawanna and their union, predicted upon a "furlough," following which they were never recalled and in fact were replaced by former Erie Railroad employees, all of which plaintiffs claimed constituted a discharge. This court held, however, that plaintiffs must first pursue their contract remedy with the Railroad Adjustment Board, and affirmed dismissal of that portion of the complaint.

[6] Section X of the bargaining agreement, headed "Discrimination and Coercion," provides in part that "[t]he Employer will not discriminate against any officer, representative or member of the Union because of any lawful activity by him on behalf of the Union." Section XI ("Discharges") provides that "[n]o employee shall be discharged by the Employer without just cause." Section XV ("Seniority") sets forth terms and conditions relating to seniority status and employee rights pursuant to such status.

F.2d 201 (6th Cir. 1961). Applying this standard, we cannot state that the complaint is so clearly infirm as to mandate a dismissal upon this ground at so early a stage of the proceedings.

However, the district court also rested its decision upon the nonexistence of the bargaining agreement. It held that (i) the agreement had not been renewed, even in the absence of the required notice, since the facts alleged were insufficient to establish an effective renewal, and (ii) the earliest breach of the agreement was in February, 1960, when it was no longer in effect. This finding was based upon the fact that August 1, 1959 was the last date upon which an automatic renewal could have been precluded and at that time a real question of representation had developed which required Carrier to maintain strict neutrality until that question was resolved by the NLRB. If this theory is valid, then Carrier was in quite a dilemma because a violation of neutrality would have also occurred had Carrier issued a notice of termination. We cannot adopt this line of reasoning because we do not believe that at that particular time Carrier was frozen from action by any "duty of neutrality." Viewing the allegations of the complaint alone, we believe that at the time Carrier was free to act or not to act and that its failure to act effectively renewed the bargaining agreement.

Whether an employer has breached a duty of neutrality is an issue generally decided by the NLRB after a full hearing upon a charge that the employer has committed an unfair labor practice in entering into a contract with a particular union while there existed a "real question of representation" among competing unions, e.g., Midwest Piping & Supply Co., Inc., 63 NLRB 1060, 17 LRRM 40 (1945), and whether such a question, with its concomitant duty of neutrality, exists is rarely susceptible of determination from

the bare allegations of a complaint. This is particularly true in this case, where there is no explicit allegation that any conflicting claims of representation were presented to Carrier prior to August 1, 1959.

In finding the existence of a real question of representation, the district court relied upon a statement in Carrier's brief that a petition for representation had been filed on May 15, 1959, which, since undenied, we will assume to be true. However, the mere filing of a petition does not, in itself, warrant a finding or conclusion that a real question of representation exists. *National Labor Relations Board* v. *Midtown Service Co.,* Nos. 33743-5, 73 LRRM 2634, 74 LRRM 2255, 2d Cir., February 25, 1970; *National Labor Relations Board* v. *Swift and Co.,* 294 F.2d 285, 48 LRRM 2699 (3d Cir. 1961); *St. Louis Independent Packing Co.* v. *National Labor Relations Board,* 291 F.2d 700, 48 LRRM 2469 (7th Cir. 1961).

The other allegation in the complaint which might have some bearing upon this question is the assertion that Sheet Metal Workers agitated for affiliation with FLU in violation of its agreement with the other Internationals. But when this agitation occurred,[7] and what form it took does not appear from the complaint. We do know that on July 1, 1959, only a month before Carrier's alleged renewal of the bargaining agreement, FLU had voted to affiliate with Steelworkers. Under these circumstances, we cannot conclude that the general allegations of the complaint compel or justify the inference that on August 1, 1959 there was a real question concerning affiliation between Steelworkers

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[7] The factual allegations of paragraph VII of the complaint follow in close chronological order, and the first allegation of agitation follows that subparagraph alleging the grant of the charter to FLU in October, 1959. Hence, it must be inferred that the alleged "agitation" did not occur prior to August 2, 1959.

and Sheet Metal Workers. Moreover, a contest among Internationals for affiliation with an existing independent local does not per se require an employer to decide that a real question of representation exists, for mere affiliation may not result in any change in the union's identity or any alteration in its status as exclusive bargaining representative. As stated by Chief Judge Parker in *National Labor Relations Board* v. *Harris-Woodson Co.*, 179 F.2d 720, 723, 25 LRRM 2346, 2348 (4th Cir. 1950):

> "It was the local union which the employees chose as their bargaining representative; and the fact that they desired it to represent them in collective bargaining was not affected by its change either of name or affiliation. On the contrary, it is perfectly clear that the only purpose of these changes was that it might be enabled thereby to bargain in behalf of the employees. * * * The identity of that representative, composed entirely of the company's employees, was not changed either by its change of name or its change of affiliation."

See also *National Labor Relations Board* v. *Hershey Chocolate Corporation*, 297 F.2d 286, 49 LRRM 2173 (3d Cir. 1961); *Continental Oil Co.* v. *National Labor Relations Board*, 113 F.2d 473, 6 LRRM 1020 (10th Cir. 1940), remanded on other grounds, 313 U.S. 212, 8 LRRM 438 (1941); *Carpinteria Lemon Association* v. *National Labor Relations Board*, 240 F.2d 554, 39 LRRM 2185 (9th Cir. 1956), cert. denied, 354 U.S. 909, 40 LRRM 2200 (1957); *East Ohio Co.*, 140 NLRB 1269, 52 LRRM 1220 (1963); *North Electric Co.*, 165 NLRB 942, 65 LRRM 1379 (1967). In any event, there is no allegation in the complaint that a claim for representation by Sheet Metal Workers or any other union had been presented to Carrier at the time of the alleged renewal, nor does the complaint reveal that any order for a representation election had been

issued by the NLRB prior to August 1, 1959, which might have provided a reasonable basis for Carrier to assume that FLU no longer represented the majority of the employees.[8] *National Labor Relations Board* v. *Swift and Co., supra; St. Louis Independent Packing Co.* v. *National Labor Relations Board, supra.* Thus we cannot read into the complaint any duty of neutrality on the part of Carrier precluding it from renewing the bargaining agreement or imputing to it an intention not to renew or any facts which would warrant a conclusion that any renewal was ineffective.

Another ground for the district court's thesis for the nonexistence of the contract was premised upon the rationale of Mattter of American Seating Co., 106 NLRB 250, 255, 32 LRRM 1439 (1953), where the Board said:

> "But, if a newly chosen representative is to be hobbled in the way proposed by the Respondent, a great part of the benefit to be derived from the no-bar rule will be dissipated. There is little point in selecting a new bargaining representative which is unable to negotiate new terms and conditions of employment for an extended period of time."

Upon this authority, the district court hypothesized that any contract resulting from a renewal would nevertheless automatically be terminated by the certification by the NLRB on January 15, 1960 of Local 5895 as the exclusive bargaining agent of Carrier's employees. Since the earliest

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[8] Carrier argues that the automatic renewal of the FLU-Carrier contract was inconsistent with subsequent events, referring to a statement in the complaint that during the latter part of February, 1960, Carrier had denounced "various proposals of the Local Union 5895" and further, that in plaintiffs' brief it is stated that "[p]laintiffs were conducting a legitimate strike demanding a new contract * * *." These statements merely raise evidentiary issues to be decided at the trial.

breach of contract alleged by appellants occurred after certification, the court concluded that the claim against Carrier must fail. We do not believe that the decision in American Seating supports this conclusion. American Seating simply held that it was an unfair labor practice for an employer to refuse to bargain with a newly certified union upon the ground that it was bound by a prior contract with a former bargaining representative. It does not follow from this reasoning that until a new agreement is reached with a new bargaining representative, the old agreement, or at least those portions thereof necessary for the continuation of the employer-employee relationship, automatically ceased to exist, provided the new bargaining representative is "kept responsive to the needs and desires of [its] constituents" (*Id.*) and remains free to negotiate a new agreement. Compare *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 550, 55 LRRM 2769 (1964).

But more important, the reasoning of American Seating is inapplicable to a case where the bargaining representative before the certification retains the same identity as the bargaining representative after the certification. The complaint alleges that Local 5895, upon certification, became the successor collective bargaining agent under the original FLU agreement, and this allegation finds support in the chronology of events as set forth in the complaint. After the bargaining agreement was allegedly renewed for an additional three-year period, FLU was issued a charter by Steelworkers in October, 1959, designating it Local 5895, United Steelworkers of America, AFL-CIO. This mere fact of affiliation, however, does not compel the conclusion that the renewed bargaining agreement at that point ceased to exist (*National Labor Relations Board* v. *Hershey Chocolate Corporation, supra*) or, as we have indicated earlier, that FLU lost its status as bargaining representative of Carrier's employees. In fact, both FLU and Carrier agreed that in the event of FLU's affiliation with an International,

the bargaining agreement would nevertheless continue in full force and effect unless Carrier chose to terminate it, which option Carrier apparently declined to exercise.[9] Following a challenge to its status, Local 5895 was certified as the exclusive bargaining representative of Carrier's production and maintenance workers after a representation election conducted by the NLRB. In the light of the foregoing, it appears from the complaint that the election produced no change in the bargaining representative for the appellants. Viewing Local 5895 as successor to FLU under this agreement, we find that American Seating is inapposite, since that case involved the effect upon an existing bargaining agreement of the certification of a *new* bargaining representative.

There is no doubt, however, that there are serious deficiencies in the plaintiffs' complaint. Assuming as true the allegation that the bargaining agreement with Local 5895 continued in full force and effect after certification of Local 5895, appellants failure to allege either that Local 5895 wrongfully and in bad faith refused to process their grievances pursuant to the established grievance procedure in violation of the Local's duty of fair representation, or that Carrier repudiated or refused to follow the grievance procedure, or that Carrier and Local 5895 effectively conspired to deprive appellants of their rights under the agreement, mandates a dismissal of the claim.[10] *Vaca* v. *Sipes*, 386 U.S.

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[9] Section XXI (B) of the bargaining agreement provides:

"If the Union shall change its existence or shall join or affiliate with some other organization, the Employer then or thereafter shall have the option to terminate the Agreement."

[10] Section VIII of the bargaining agreement sets forth a specific procedure for the settlement of grievances, and provides as follows:

"(A) Any Employee who believes that he has a justifiable request, difference, or complaint shall—

1. See his Foreman and discuss the same in an attempt to reach an agreement

or

2. See his Foreman and request the presence of his Steward to assist in arriving at a settlement. The Foreman shall send for the Steward promptly.

(B) Any request, difference, or complaint not settled under the procedure set forth in Paragraph (A) of this section constitutes a grievance within the meaning of this section and shall be disposed of as follows:

Step 1. Any grievance as above defined shall be set forth in writing on a grievance form, in duplicate, and shall be presented to the Foreman by the Shop Steward with or without the Employee being present.

The Foreman will again review the grievance and shall endorse thereon his disposition and his reasons therefor.

If a settlement to the satisfaction of the Employees has not been arrived at under Step 1 within two (2) working days, an earnest effort will be made to settle such grievance in the following subsequent steps:

Step 2. Between the Employee and/or his Steward and whoever represents the next level of Supervision above Foreman.

Step 3. Between the Grievance Committee and a major Department Head or a representative selected by him, or at his option a Committee of four (4) representing Management who shall meet within three (3) working days.

Step 4. Between the Executive Committee of the Union and an Executive Officer of the Employer.

In each step, the reasons for the decision of the Employer shall be endorsed on the grievance form.

(C) Should the Executive Committee and the Employer fail to settle such grievance, such grievance shall be submitted to arbitration for questions of fact or interpretation of this agreement before Mr. W. Albert Rill for the Union and Mr. Steward F. Hancock for the Employer. If such arbitrators agree, their decision shall be final and binding on both parties. If such arbitrators fail to agree, they may select a third arbitrator, but in case they cannot agree upon a third arbitrator then either party may apply on two (2) days' notice in writing to the Onondaga County Judge for the appointment of a third (3rd) arbitrator. The decision of a majority of said three (3) arbitrators shall be final and binding on both parties.

The Employer shall pay two-thirds and the Union one-third of the expense of arbitration.

(D) Any grievance not appealed from a decision under the first four steps within five (5) working days shall be considered settled on

171, 64 LRRM 2369 (1967); *Desrosiers* v. *American Cyanamid Company, supra.*

The requirement that an aggrieved employee resort to the grievance procedure is not a mere ritual or formality. It is a necessary complement to the union's status as exclusive bargaining representative, enabling it to actively participate in the continuing administration of the contract. *Republic Steel Corporation* v. *Maddox*, 379 U.S. 650, 653, 58 LRRM 2193 (1965). Without it the employer and the union could not "establish a uniform and exclusive method for orderly settlement of employee grievances" (*Id.*) and the underlying policy in favor of such a settlement of labor disputes would be frustrated.

It is true that paragraph IX(b)(8) of the complaint charges all the defendants, including Carrier, with conspiracy to prejudice the appellants' rights to fair repre-

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the basis of the last decision and not subject to further appeal.

A grievance decision awarded in favor of the Employee shall be made retroactive to the date when the current grievance was formally submitted at Step 1, except in a case involving elaborate study which would prevent normal action. In such instances, the retroactivity will not exceed thirty (30) working days, plus the time spent for arbitration if this procedure is taken. No decision in one case shall create a basis for a retroactive adjustment in any other case.

(E) Rules of procedure shall be prepared from time to time by the Employer, submitted to the Executive Committee of the Union for its approval and when so approved shall govern the details of carrying out the foregoing plan for settlement of grievances.

(F) The arbitration procedure set forth in this Agreement shall not apply to matters covered by the following, unless individual cases are submitted to arbitration by mutual consent of the Employer and the Union:

Section VIII—Settlement of Differences and Grievances and Arbitration Procedure.

Section XI—Discharges.

Section XII—Wages.

Section XX—Legality.

Section XXII—Duration of Agreement."

sentation by Steelworkers and Local 5895 "in the various proceedings before the National Labor Relations Board and the court by improper, inadequate and negligent representation furnished by the United Steelworkers of America, AFL-CIO, and by refusal or failure of United Steelworkers of America, AFL-CIO, and Local 5895 to prosecute in good faith the past and continuing grievances against the employer, Carrier Corporation, for unfair labor practices including a permanent lock out." But such claims are cast in the form of a general catch-all charge of conspiracy without reference to any specific acts or failures to act under the grievance procedure of the bargaining agreement. Into those conclusory and grammatically imperfect allegations we cannot read a wrongful failure or refusal on the part of Local 5895 to resort to the specified grievance procedures set forth in the agreement. Appellants make another attempt, in the vague allegation in paragraph XIII, to set forth in justicable claim by charging that as a direct consequence of the combination of the wrongful actions of the defendants "plaintiffs * * * have been deprived of * * * arbitration rights and other rights and privileges provided in the Collective Bargaining Agreement." This allegation does not supply the essential elements to charge Carrier with conduct amounting to a repudiation of the grievance procedure.

But we are not certain from a reading of the multitudinous allegations of the complaint whether this deficiency is due to the inability of the appellants to allege facts sufficient to constitute the wrong or to the ineptitude of the pleader. Under the circumstances we believe that the appellants should be granted leave to amend in this respect, if they can do so, in order to state a § 301 claim against Carrier."

" In the same amendment plaintiffs should avail themselves of the opportunity to specify the provisions of the contract which they claim were violated.

§ 301 Claim Against Steelworkers

Relying upon that portion of § 301 (a) which permits suits to be brought for violations of "contracts between such labor organizations" representing employees in an industry affecting commerce, appellants invoke the jurisdiction of this court against Steelworkers under § 301. *Cf. Smith* v. *Evening News Association*, 371 U.S. 195, 51 LRRM 2646 (1962). They claim that Steelworkers "breached the contract created by the charter and bylaws granted to Local Union No. 5895." While the complaint alleges what appellants conceive to be the many obligations owed to them and to Local 5895 under the charter and by-laws as a contract,[18] neither of the documents was

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[18] The complaint alleges (paragraph VII(n)) that under the charter Steelworkers "agreed and undertook to represent the members of the said Federal Labor Union, guaranteed that plaintiffs and other members of the Federal Labor Union would receive substantial benefit by reason of the affiliation with the membership; that they would never withdraw individual membership of any member except for cause; that they would never withdraw the charter for any reason; that members would continue their employment at the Carrier Corporation plant in Syracuse; that in the event of a strike, lock out, or other labor difficulty the plaintiffs and other members of the Federal Labor Union's job security would be protected; that the plaintiffs and other members of the Federal Labor Union would be the beneficiaries of the funds of the United Steelworkers International AFL-CIO in the event of labor difficulties at Carrier Corporation plant in Syracuse; that representatives of the Steelworkers International AFL-CIO and its legal advisors would in no way agree or allow any decrees, judgments, stipulations to interfere with the plaintiffs' employment rights and that each individual member of the said Federal Labor Union would be backed by the full resources of the Steelworkers International AFL-CIO and in no event be deprived of his employment."

Later in the complaint (paragraph X(a)), plaintiffs alleged that under the "charter and by-laws" Steelworkers agreed "to protect the rights of the members of the local union, represent them diligently, fairly and in good faith in any negotiations or proceedings in court or before the NLRB and to afford them the benefit of the funds of the International Union in the event of work stoppage due to industrial strife."

annexed to the complaint although the charter purports to be and obviously was intended to be so annexed. However, as an aid in determining whether such a § 301 contract has been alleged, we have considered the standard form of charter and by-laws furnished the court by Steelworkers.

The Supreme Court in *Retail Clerks International Association, Local Union Nos. 128 and 633* v. *Lion Dry Goods, Inc.*, 369 U.S. 17, 49 LRRM 2670 (1962), held that § 301 contracts are not limited solely to collective bargaining agreements but include also labor contracts other than collective bargaining agreements, as, for example, strike settlement agreements. We have been unable to find any authority holding that a charter *per se* or a charter and by-laws alone constitute a "contract" sufficient to support § 301 jurisdiction, although there is ample support for the proposition that a Constitution of an International Union constitutes a contract between that International and its Local sufficient to confer such jurisdiction. *Parks* v. *International Brotherhood of Electrical Workers*, 314 F.2d 886, 52 LRRM 2281 (4th Cir. 1963), cert. denied, 372 U.S. 976, 52 LRRM 2943 (1963). See also *Welch* v. *Breckenridge*, 284 F.Supp. 125, 68 LRRM 2674 (W.D. Ark. 1968); *Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO* v. *Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, Local Union No. 127*, 264 F.Supp. 301, 64 LRRM 2072 (N.D. Cal. 1967); *Burlesque Artists Association* v. *American Guild of Variety Artists*, 187 F.Supp. 393, 42 LRRM 2818 (S.D.N.Y. 1958).

The Steelworkers standard form of charter is on its face merely a broadly drawn certificate of affiliation, providing that "such rights and privileges as may from time to time be determined" by Steelworkers will inure to the benefit of Local 5895 conditioned upon the latter's compliance with "the rules, regulations, and laws for Local Unions duly

adopted by the United Steelworkers of America." Whether such a local union charter standing alone without reference to the constitution of the international may form the basis for a contract action under § 301 is open to grave doubt. See Note, Applying the "Contracts Between Labor Organizations" Clause of Taft-Hartley Section 301: A Plea for Restraint, 69 Yale L.J. 299, 306-7 (1959). But since appellants have pleaded in detail the rights and privileges they claim are secured by the charter[14] (which do not appear on the face of the standard form) and the violations of such rights and privileges,[15] they should be given an opportunity to prove the same. Accordingly, we cannot conclude that the claim should be dismissed upon this ground.

There is one other difficulty associated with appellants' § 301 claim based on the charter, namely, the issue of appellants' standing to sue on this basis at all. Plaintiffs indi-

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[14] See fn. 12.

[15] The complaint also alleges (paragraph X (a)): "The United Steelworkers of America breached that contract beginning in the middle part of March 1960 by failing adequately and fairly to represent the members of Local Union 5895 in good faith in the proceedings before the court and the NLRB arising from the industrial strife precipitated by the March 2, 1960, lock out by Carrier Corporation. Breaches have continued from that time to the present time and include, among other things, failure to adequately and fairly represent the membership of Local Union 5895 in good faith, including plaintiffs in this action in the industrial strife arising from the lock out of March 2, 1960, by Carrier Corporation; in refusing to afford to the membership of Local Union 5895, and especially to the plaintiffs in this action, the benefit of the funds available to the international union for the purpose of assisting the local unions in their industrial problems with management; in abandoning plaintiffs and the other members of Local Union 5895 on November 30, 1961, such abandonment being complete and being a calculated and deliberate capitulation to the wanton, malicious and willful industrial warfare waged by Carrier Corporation and Sheet Metal International and Local Unions to oust Local Union 5895 as the collective bargaining representative of the production and maintenance workers of the Syracuse plant of Carrier Corporation."

virtually were not parties to the charter, and their asserted right to bring suit can only derive from their status as third-party beneficiaries, the charter benefits running in the first instance to Local 3205. In this posture plaintiffs, before bringing an action for breach of the charter upon the claim that it is a contract, must first allege that Local 3205 has wrongfully and in bad faith refused, after proper demand, to request Steelworkers for aid and assistance pursuant to the alleged obligations existing under the charter; or, in the alternative, they must allege that such a demand would have been futile. *Cf. Vaca v. Sipes, supra; Bernstein v. American Gypsum Co., supra.* As the failure to so allege may have been no more than error in pleading and since we are permitting amendments in other respects, appellants should be granted the opportunity to redraft their complaint on this point as well.

§ 301 Claim Against Sheet Metal Workers and Local 527

The predicate for these claims is paragraph 12 of the Agreement Among the Internationals, referred to as a "no-raiding" agreement, to which both Sheet Metal Workers and Steelworkers were signatories, reading:

> "When an International Union is chosen to represent the members of the Carrier Corporation, the other International Unions signator to this Agreement will not intervene or be a party to any National Labor Relations Board Election."

This raises an issue of both jurisdiction and enforceability, upon which there has been no clearcut decision. In *United Textile Workers of America, AFL-CIO* v. *Textile Workers Union of America*, 230 F.2d 742, 42 LRRM 2025 (7th Cir. 1956), the Seventh Circuit held that an arbitration award pursuant to a no-raiding agreement was enforceable, while two years later Judge Madden of the District Court of Col-

forth decided in *International Union of Doll & Toy Workers of United States and Canada, AFL-CIO* v. *Metal Polishers, Buffers, Platers & Helpers International Union, AFL-CIO*, 160 F.Supp. 280, 45 LRRM 2267 (S.D. Cal. 1958), that, with due respect to United Textile Workers and the literal reading of § 301(a), the Congressional policy developed under the National Labor Relations Act conferred exclusive jurisdiction over such agreements upon the NLRB and that the district court therefore lacked jurisdiction to enforce the same. As a matter of practice, the NLRB has refused to automatically enforce such agreements upon the ground that to do so "would permit a private resolution of the question concerning representation in a manner contrary to the policies of the [National Labor Relations] Act and would impinge upon the Board's exclusive jurisdiction and authority to resolve such questions of representation." Great Lakes Industries, Inc. (Cadmium & Nickel Plating Div.), 124 NLRB 353, 44 LRRM 1387 (1959). Subsequently, in 1962, the Supreme Court in Retail Clerks International Association, *supra*, cited United Textile Workers as an example of labor contracts other than collective bargaining agreements subject to § 301 jurisdiction. In an entirely different context, we noted in Lodge 743, *International Association of Machinists, AFL-CIO* v. *United Aircraft Corporation*, 337 F.2d 5, 57 LRRM 2245 (2d Cir. 1964), cert. denied, 380 U.S. 913, 58 LRRM 2696 (1965), that the same Court of Appeals which decided United Textile Workers seriously questioned the blanket enforceability of no-raiding agreements notwithstanding § 301 jurisdiction (*National Labor Relations Board* v. *Weyerhaeuser Company*, 276 F.2d 665, 45 LRRM 3088 (7th Cir. 1960), cert. denied, 364 U.S. 879, 47 LRRM 2665 (1960)), and prior thereto we remarked in *Local 32, International Hod Carriers, etc.* v. *Mason Tenders, etc.*, *supra*, at 503, that the enforcement of a no-raiding agreement pursuant to § 301 may impinge upon the "closely co-

tabilished activities of the NLRB," requiring the district court to stay its hand.

We need not, however, attempt to resolve this unsettled issue since it is clear that the appellants, not being signatories to the Agreement, have no standing to sue. Obviously, the Agreement among the five international unions was not made for the benefit of appellants but for the benefit of the particular international emerging victorious in the AFL-CIO election of July 1, 1959. Whatever legally cognizable damage resulted from the entrance of Sheet Metal Workers into the NLRB election of January 7, 1960, or from its continued agitation for membership of Local 3883, or from the certification of Local 527 on November 30, 1961, was suffered by the Steelworkers, which lost members, dues, assessments, and possibly prestige. We can see no possible harm to the appellants except disappointment that a majority of Carrier employees shifted sentiment to another union. Of course, this emotional disappointment will not justify a suit against Sheet Metal Workers pursuant to § 301 by individual employees for back pay, reinstatement of employment and union membership, together with damages caused by an allegedly unjust refusal of Carrier to rehire the appellants after a work stoppage.

LMRDA Claim Against Carrier and Steelworkers

Appellants charge Carrier and Steelworkers with violating their rights under §§ 101 et seq. of the LMRDA, the Bill of Rights of Members of Labor Organizations. Essentially, the Bill of Rights is addressed to the regulation of the internal affairs of the union, insuring to members equal rights and freedom of speech in the conduct of union affairs, and due process in disciplinary proceedings.

Relying upon *Thompson* v. *New York Central Railroad Company*, 361 F.2d 137, 62 LRRM 2319 (2d Cir. 1966),

Judge Port held that the allegations of the complaint did not confer subject-matter jurisdiction over Carrier. In the Thompson case, the dismissal by the district court of the employees' claim charging conspiracy of the employer with the union, was affirmed. We said there: "Thus it has been consistently held that the Labor-Management Reporting and Disclosure Act regulates only the relationship between an employer and his employees." *Id.*, at 165. In a similar case in the Fourth Circuit, *Duncan v. Peninsula Shipbuilders Association*, 394 F.2d 287, 290, 68 LRRM 2135 (4th Cir. 1968), the court in upholding the dismissal of a similar complaint, stated: "But even if the plaintiff did count on collaborative conduct of the union and the employer, the union alone can be held for its conspiratorial part, without holding the other parties." See also, *Fanning v. United Scenic Artists, Local 829 of the Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO*, 262 F.Supp. 655, 64 LRRM 2445 (S.D.N.Y. 1967); *Rinker v. Local Union No. 24 of Amalgamated Lithographers of America*, 201 F.Supp. 204, 49 LRRM 2696 (W.D. Pa. 1962), appeal dismissed, 313 F.2d 956, 52 LRRM 2479 (3d Cir. 1963); *Fogg v. Randolph*, 244 F.Supp. 885, 888, 52 LRRM 2215 (S.D.N.Y. 1962). Jurisdiction over an employer comes from § 301 and where, as here, the only basis for jurisdiction over Carrier under the LMRDA is an allegation of employer-union conspiracy to violate rights protected by that Act, the union alone may be held and the jurisdictional defect cannot be circumvented by a conspiracy allegation.

A similar Bill of Rights claim asserted against Steelworkers was dismissed by Judge Port because of the conclusory nature of the allegation. The complaint charges that Steelworkers' violations of the Act "include, but are not limited to the activities described in paragraph VII of this amended complaint." This paragraph consists of thirty-eight sub-

paragraphs constituting an elaborate and prolix chronicle of the totality of events surrounding the industrial turmoil at Carrier's plant. Title I of the LMRDA is not a catch-all into which might be swept all manner of miscellaneous charges without any specificity. *Scoville v. Watson*, 338 F.2d 670, 681, 57 LRRM 2513 (7th Cir. 1964), cert. denied, 380 U.S. 963, 58 LRRM 2708 (1965); *Green v. Local 705, Hotel and Restaurant Employees' and Bartenders' International Union, AFL-CIO*, 220 F.Supp. 505, 54 LRRM 2372 (E.D. Mich. 1963). The otherwise bald assertion that the Act has been violated does not disclose a specific infringement which would justify the maintenance of the action. Were this the only claim set out in the complaint, we would be inclined to affirm its dismissal because of its almost complete lack of substance as drafted. However, as the appellants are to be granted one final attempt to state with clarity their allegations on certain other points, there is little reason why they should not be granted the same opportunity in connection with their alleged LMRDA claim against Steelworker, in reliance on the assumption that any such redrafted allegation will state in *clear and concise language* exactly which sections of the LMRDA have been breached and what damage appellants have suffered thereby.

Breach of Duty of Fair Representation Against Steelworkers

In paragraph X(d) of the complaint appellants seek to charge Steelworkers with a breach of its duty of fair representation. Apart from the fact that this paragraph defies normal grammatical interpretation, it very closely approaches a recitation of mere conclusions of law, insufficient under Rule 8(a), Fed. R. Civ. Proc., 28 U.S.C. *Slagey v. Illinois Central Railroad Co.*, 397 F.2d 546, 552, 68 LRRM 2579 (7th Cir. 1968). Yet, since there is an allegation of bad faith, *Simborlum v. Long Island Railroad Co.*, 421

F.2d 1218, 73 LRRM 2481 (2d Cir. 1970), and in light of our duty to liberally construe fair representation claims, Conley v. Gibson, 355 U.S. 41, 78 LRRM 2401 (1957), the complaint can be read as stating a claim that Steelworkers violated its duty to represent the appellants fairly.

The district court nevertheless dismissed the fair representation claim on the theory that it was time-barred. In so holding the district court found that "the duty of fair representation is a fiduciary obligation," and applied the three-year limitation period provided in N.Y. CPLR §214 (4). Even if the facts are assumed to be those most favorable to appellants, more than three years had elapsed before the suit was commenced and therefore the claim was dismissed. While we agree that the district court properly looked to New York State law in determining the limitation period, we disagree as to the particular statute which applies and conclude that the unfair representation claim against the Steelworkers was not time-barred.

The union's duty of fair representation, first enunciated by the Supreme Court in *Steel v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 15 LRRM 708 (1944), requires the exclusive bargaining representative "to serve the interests of all members without hostility or discrimination toward any." *Vaca v. Sipes*, supra, at 177. This duty was derived from a union's statutory right to be the exclusive representative of the members of a designated unit, from which the Supreme Court found an implied statutory obligation to give members equal representation. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 31 LRRM 2548 (1953). The duty of fair representation is thus a federal obligation which has been judicially fashioned from national labor statutes.

In the case of federal rights created by statute, the traditional rule has long been that the district court is to look

to the law of the state where it sits to determine the appropriate limitation period when no such limitation has been provided by Congress. *McClany* v. *Silliman*, 28 U.S. (3 Pet.) 270, 276-77 (1830); *Auto Workers Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 61 LRRM 2345 (1966); *Movielab Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir. 1961), cert. denied, 368 U.S. 821 (1961). Recognizing as we do the problems of non-uniformity outlined in Mr. Justice White's dissent in Hoosier Cardinal, *supra*, at 709-14, we can nevertheless see no grounds for distinguishing a right forged by judicial interpretation from one expressly created by Congressional enactment and hold that the district court's decision to turn to state law was correct. See *Gray* v. *International Ass'n of Heat & Frost Insulators*, 416 F.2d 313, 316, 72 LRRM 2383 (6th Cir. 1969).

In determining which state limitation period is applicable in the case of a wholly federal right, it is for the federal court to consider the character of the claim involved, and give effect to the nature and purpose of the federal act from which the claim derives and to the federal objectives pursued. See *Movielab Ltd.* v. *Eastman Kodak Co.*, *supra*, at 83-84; *Romer* v. *Leary*, 425 F.2d 186 (2d Cir. 1970). Therefore while the duty of fair representation is a "fiduciary" obligation in the sense that the union is bound to act in good faith with regard to the interests of its members, this label should not necessarily control the legal relationships of the parties for all purposes. The union's obligation here involved does not fall within the category of orthodox fiduciary relationships. The label "fiduciary relationship" is merely a shorthand description for a number of obligations flowing from the union to member, and it is preferable, at least for limitation purposes, that the characterization of the duty of fair representation reflect the actual substance of the duty owed.

In the present case appellants' claim is essentially that Steelworkers unjustifiably refused to try to enforce the

rights provided for them in the labor contract with Carrier —in particular, the right not to be wrongfully discharged. The duty of the union to its members in this regard is tied to the contractual obligations of Carrier to the union as representative of the employees and therefore resembles right-duty relationships between contracting parties, where one is bound to use good faith or its best efforts on behalf of the other. Thus the unfair representation claim against Steelworkers in this court is intimately related to the § 301 claim against Carrier since both stem from the unauthorized discharge of the appellants contrary to the terms of the labor agreement. Even though these are two distinct rights capable of separate vindication, see Conley v. Gibson, *supra*, because of their interrelated nature, it would seem appropriate to apply the same limitation period to both claims. Indeed, in proving their case against Carrier appellants will of necessity "prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee[s'] grievance." Vaca v. Sipes, *supra*, at 186, 64 LRRM 2373. Therefore the traditional argument for a short limitation period, that claimants should not be permitted to bring actions based on stale evidence long after the parties had a right to assume that the claim would not be pursued, is simply inapplicable; no matter what the disposition of the claim against the union, the claim against the employer, based on the same evidence, will still go forward. And as the Supreme Court noted in Vaca v. Sipes, *supra*, at 187, 64 LRRM 2373, there would be no sense "in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer" and again at 188, 64 LRRM 2376, fn. 12, "* * * These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, *time limitations*, and remedial powers, must participate." (Emphasis added.)

We therefore hold that when a § 301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employee's grievance, the same period of limitations should be applied to both claims." In the present case, the proper limitation period to be applied to the contract claim against Carrier is the six-year limitation set out in N.Y. CPLR § 213 (2) for "an action upon a contractual obligation or liability express or implied." *Auto Workers Union v. Hoosier Cardinal Corp.*, *supra*, at 703-05. As this is the relevant limitation period, we hold that the claim against Steelworkers was improperly dismissed as untimely, because even the earliest date from which Steelworkers asserts the period would run, falls within the six-year limitation.

It is nevertheless necessary that appellants' complaint be reinstated on this claim as well, for as we noted above, the allegations are currently drafted with such a lack of clarity and precision that the unfair representation claim has barely been set out. In reinstating this portion of the complaint, appellants should be particularly mindful of *Vaca v. Sipes*, *supra*, and the pleading requirements set out therein.

"It is again to be emphasized, however, that it does not follow that the limitation period for breach of contract and contract-related claims will apply to all suits brought against a union by a disgruntled member which are ostensibly directed within the fair representation rubric. In each instance the source of the alleged act of commission or omission on the part of the defendant union must be examined to determine the appropriate federal characterization for statute limitations purposes. We therefore express no opinion as to whether, given allegations other than the union refusal to exhaust the employees' contract rights, we might adopt the "statutory duty" characterization of *Gray v. International Ass'n of Heat & Frost Insulators*, 449 F.2d 313, 316, 78 LRRM 2889 (5th Cir. 1971), the tort characterization of *Figueroa v. Sindicato de Trabajadores Portuarios*, Slip Op. No. 7455, 1st Cir., April 17, 1979, 96 LRRM 2888, or some other appropriate classification.

Preempted Claims Against Carrier, Steelworkers and Sheet Metal Workers

In their complaint appellants include a number of rather ambiguous allegations against the defendants which most generously construed, set forth claims that fall within the doctrine of preemption. For instance, they allege that Carrier, Sheet Metal Workers and Local 327 were guilty of a campaign of industrial warfare to oust Local 3095 as collective bargaining representative, culminating in the withdrawal of Local 3095's charter on November 30, 1961, and also that Carrier, Sheet Metal Workers and Local 327 blacklisted appellants and prevented their employment by other employers because of appellants' concerted activity during the strike. In *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 245, 43 LRRM 2838 (1959), the Supreme Court held: "When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Here both of these charges are "arguably subject to § 7 or § 8 of the Act" (e.g., Cone Brothers Contracting Company, 135 NLRB 108, 49 LRRM 1456 (1962) [blacklisting of employee for strike activity held to be unfair labor practice]), and therefore come within the primary jurisdiction of the National Labor Relations Board, to which this court must defer. See *Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko*, 373 U.S. 701, 53 LRRM 2227 (1963). In asserting their claim against the Steelworkers, appellants were satisfied to simply allege that Steelworkers were guilty of unfair labor practices. Without more, this charge is manifestly one preempted to the primary jurisdiction of the Board.

Claims Against All the Defendants

The complaint additionally alleges a plethora of conspiracy claims against all the defendants, charging them with conspiring to commit the various wrong charged against each defendant individually. These claims must be dismissed for two reasons. First, there exists no federal statute conferring independent jurisdiction upon the federal courts for claims of civil conspiracy in the labor relations field (see *Hall* v. *Pacific Maritime Association*, 281 F.Supp. 54, 67 LRRM 2756 (N.D. Cal. 1968); *Cole* v. *Hall*, 35 F.R.D. 4, 55 LRRM 2806 (E.D.N.Y. 1964)), nor does conspiracy to violate either a labor contract or an individual's rights under the LMRDA suffice to vest the courts with jurisdiction pursuant to § 301 of the LMRA or § 102 of the LMRDA, respectively. See *Aacon Contracting Co.* v. *Association of Catholic Trade Unionists*, 178 F.Supp. 129, 45 LRRM 2111 (E.D.N.Y. 1959), affirmed, 276 F.2d 958, 46 LRRM 2003 (2d Cir. 1960); *Curtis Bay Towing Company of Pennsylvania* v. *National Maritime Union of America*, 206 F.Supp. 741, 50 LRRM 2656 (E.D. Pa. 1962); *Thompson* v. *New York Central Railroad Co.*, *supra*. Second, we find no authority creating a common law federal tort based upon an allegation of conspiracy alone.

The allegation of "conspiracy" is nothing more than a makeweight which adds nothing to the substance of the allegations against the individual defendants. There was therefore no impropriety on the part of the district court in dismissing such superfluous portions of the complaint.

Among the many conspiracy charges in the complaint is one which attempts to articulate a conspiracy to wrongfully deny appellants membership in Local 527. Appellants also set forth a separate claim against Sheet Metal Workers and Local 527 of wrongful denial of membership which should be considered at the same time. Wrongful denial of union

membership does not come within the ambit of either § 301 of the LMRA or § 102 of the LMRDA.[10] Nor is the right to union membership equivalent to the right to fair representation, for the latter exists independent of the former and extends to union members and non-members alike, so long as the employees are in the bargaining unit. *Steele v. Louisville & N.R. Co., supra.* But appellants have not charged Sheet Metal Workers or Local 527 with the breach of their duty of fair representation. Therefore, both the individual claim against Sheet Metal Workers and Local 527 as well as the conspiracy claim against all the defendants respecting the unjust denial of union membership, must be dismissed.

Pendent State Claims

Charging Carrier, Sheet Metal Workers and Local 527 with malicious libel and slander of the appellants in connection with the latter's union activities, appellants invoke the pendent jurisdiction of this court. While this type of conduct may arguably constitute an unfair labor practice, the Supreme Court has said that the State interest for the protection of its residents from such tortious conduct is so compelling that State jurisdiction should be permitted. *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 61, 61 LRRM 2345 (1966). The doctrine of pendent jurisdiction is a doctrine of discretion and not of a plaintiff's right. Only if the federal claim has sufficient substance to confer subject-matter jurisdiction and both the State and federal claims derive from a common nucleus of operative facts should the federal court exercise its pendent jurisdiction in order to try all claims in one ju-

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[10] In fact, § 8(b)(1) of the NLRA provides that while it is an unfair labor practice for a union to restrain or coerce employees in the exercise of § 7 rights, "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership."

dicial proceeding. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 61 LRRM 2561 (1966); *Vanity* v. *Bonnaro*, 376 F.2d 197, 65 LRRM 2019 (2d Cir. 1967), cert. denied, 389 U.S. 874 (1967). In review of the fact that the district court dismissed all the federal claims, its refusal to exercise pendent jurisdiction over any charges of malicious libel and slander as well as any other causes of action cognizable under State law that might be spelled out from the allegations of conspiratorial conduct previously discussed, was clearly warranted.

As we are permitting appellants to replead certain portions of the complaint, the district court nevertheless may wish to reconsider the pendent jurisdiction issue if jurisdiction over any of the federal claims should eventually be sustained.

Second Cause of Action

Since the second cause of action, charging the defendants with deliberate ouster of appellants from union membership and job employment, essentially duplicates the first cause of action, and fails to set forth any additional basis of jurisdiction and does not otherwise state any additional claims upon which relief can be granted, dismissal by the district court of this portion of the complaint was also correct.

On remand the appellants are granted leave to file, within 30 days of the judgment of this court, an amended complaint for the purpose of restating their § 301 claim against Carrier and their § 301, § 101 and unfair representation claims against Steelworkers to correct the deficiencies above discussed.

The case is remanded to the district court for further proceedings in accordance with this opinion. It is so ordered.

UNITED STATES DISTRICT COURT
Northern District of New York

Ernest E. Abrams, et al., *Plaintiffs*,

vs.

The Carrier Corporation, et al., *Defendants*.

John G. Slanski, et al., *Plaintiffs*,

vs.

The Carrier Corporation, et al., *Defendants*.

MEMORANDUM-DECISION AND ORDER

The orginal complaints in these cases were conditionally dismissed as "incomprehensible . . . and generally confusing"[1], and violative of Rule 8, F.R.Civ.P. requiring that the complaint "contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, . . .".

Motions to dismiss the amended complaint for failure to comply with Rule 8, F.R.Civ.P. were denied.[2] No objections have been raised to the assertion in one amended complaint of the claims originally alleged in separate complaints in each of the above numbered civil actions.

Briefs of all parties were filed, and motions to dismiss upon the merits were finally submitted to the court in September 1967. The undue delay in disposing of these motions was due in part to my incapacitation of several months duration.

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[1] Memorandum-Decision and Order dated March 22, 1966.

[2] Memorandum-Decision and Order dated January 6, 1967.

THE COMPLAINT

The complaint alleges:

The Parties:

The Plaintiffs are approximately 225 former employees of the defendant Carrier Corporation, and also were members of the defendant United Steelworkers of America, AFL-CIO through membership in Local 5895, United Steelworkers of America, AFL-CIO.

The Defendants are the Carrier Corporation (chartered in Delaware and licensed to do business in New York), United Steelworkers of America, AFL-CIO (an unincorporated labor organization), and Sheet Metal Workers International Association, AFL-CIO, and Sheet Metal Workers Union, Local No. 527, AFL-CIO (unincorporated labor organizations).

Jurisdiction:

The amended complaint asserts that jurisdiction is conferred upon this court by § 301 of the Labor Management Relations Act of 1947 (29 U.S.C.A. § 185)[3], by § 102 of the Labor Management Reporting and Disclosure Act (29 U.S.C.A. § 412)[4], and by § 1332 of the Judicial Code (28

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[3] § 301 Labor Management Relations Act (29 U.S.C.A. § 185) provides, in pertinent part:

(a) Suits for violation of contracts between and employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[4] § 102 of the Labor Management Reporting and Disclosure Act (29 U.S.C.A. § 412) provides, in pertinent part:

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such

U.S.C.A. § 1332)[5].

Historical Background:

During 1956 the Federal Labor Union No. 23083 (hereafter "FLU"), affiliated with the AFL and later with the AFL-CIO, was the exclusive bargaining representative of the production and maintenance employees at Carrier Corporation's Syracuse plants. On November 8, 1956, FLU entered into a collective bargaining contract with Carrier, effective from September 4, 1956, which was to remain in effect for a period of three (3) years. This contract was to continue until 1959, and unless one of the parties gave notice of termination in writing at least 60 days before September 30, 1959, the contract would be extended for another three (3) years. Plaintiffs allege that the notice of termination was never given and therefore the contract was extended for another three-year period. Plaintiffs' assert that they were members of FLU and its successor, United Steelworkers of America, AFL-CIO (Local 5095) and therefore they were entitled to the benefits of the above-described contract.

On June 21, 1959, the membership of FLU voted to affiliate with an international of the AFL-CIO. As a result

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action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

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[5] § 1332 of the Judicial Code (28 U.S.C.A. § 1332) provides, in pertinent part:

(a) the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

of the vote to affiliate with an international, a number of internationals attempted to enlist the affiliation of the FLU membership; an agreement, entitled *Agreement Among the Internationals*, was entered into by the International Brotherhood of Electrical Workers, the International Association of Machinists, the United Steelworkers of America, the International Union of Sheet Metal Workers (hereafter "Sheet Metal"), the International Union of Electrical Workers, and the Federal Labor Union No. 23083. This agreement provided for the mechanics of an election to determine with which international to affiliate. The Agreement provided that after the FLU membership voted for the international with which they wished to affiliate, then the other internationals "would not intervene or be a party to any National Labor Relations Board Election."

On July 1, 1959, the election was held among the FLU membership and they voted to become affiliated with the United Steelworkers of America, AFL-CIO. The election was arranged and sponsored by the AFL-CIO and not by the National Labor Relations Board (hereafter "NLRB"). On October 2, 1959, a Charter was issued to the FLU membership by the United Steelworkers of America, AFL-CIO (hereafter "Steelworkers"), designating them as Local Union No. 5895, United Steelworkers of America, AFL-CIO (hereafter "Local 5895"). Plaintiffs claim that this Charter, together with the By-laws, constituted a contract between Steelworkers International and Local 5895.

Plaintiffs allege that contrary to the *Agreement Among the Internationals*, defendants Sheet Metal continued to agitate for affiliation with the membership of the FLU. This agitation culminated in Sheet Metal's entrance into an NLRB election held on January 7, 1960. Local 5895 won this election, and on January 15, 1960, the NLRB certified it as the exclusive bargaining representative of the production and maintenance employees at Carrier's Syracuse plants.

Shortly after being certified as exclusive bargaining representative by the NLRB, contract negotiations began between Local 5895 and Carrier Corporation (hereafter "Carrier"). Disagreement between the two parties arose in February 1960, centering around the issue of overtime. Local 5895 voted to refuse to work overtime, because it felt Carrier was preparing for a strike and a lock-out. On March 2, 1960, the overtime dispute culminated in the reprimand of five employees, all officers of Local 5895, by Carrier, and the suspension of one of them, Francis Brewster the President of Local 5895, from work. The reprimand and suspension precipitated the closing of Carrier's Syracuse plants. Plaintiffs assert that Carrier notified all employees on March 3, 1960, that the plants were closed and would be opened at the convenience of Carrier, hence a lock-out. Picketing of the plants by Local 5895 began on March 3, 1960.

Negotiations between Local 5895 and Carrier were begun to end the work stoppage, and resulted in the presentation of an oral agreement, and an interim unsigned agreement to the membership of Local 5895 on March 27, 1960. This agreement was accepted by the membership on that date. Shortly after the agreement was accepted by the membership, a dispute erupted that destroyed it. Plaintiffs claim that Carrier informed Local 5895 that Francis Brewster, the President of Local 5895 would not be permitted to return to work after the work stoppage was ended pursuant to the agreement. Upon the receipt of this news, picketing was resumed by Local 5895.

On March 28, 1960, Carrier offered to reemploy anyone who wanted to return to work, and "campaigned" to induce the workers to return to work.

Plaintiffs continued picketing until mid-May, at which time Carrier announced that those still "out on strike" should return to work or their jobs would be filled.

Plaintiffs assert that they have been without work, at

least work of a corresponding character, since March 2, 1960, as a result of the lockout, and that they have been unable to find new or like work until the present time. They allege that they have been permanently barred from employment at Carrier's Syracuse plants and have been blacklisted throughout the Syracuse area. They allege damages in the sum of $75,000,000.

On November 30, 1961, Sheet Metal Local 527 became the collective bargaining agent of the production and maintenance employees in Carrier's Syracuse plants. Plaintiffs claim that the United Steelworkers of America, AFL-CIO, contrary to its alleged "contract" with the plaintiffs and other members of Local 5895, as embodied in the Charter and By-laws issued to the Local by the parent International, withdrew as the representative of the plaintiffs and refused to intercede on their behalf, on and after November 30, 1961.

The complaint alleges that Sheet Metal, Local 527 has unjustifiably refused them membership and seniority rights in that union, based upon their employment history at Carrier and their membership history with Local 5895. Finally, Carrier Corporation is claimed to have published a book entitled *How To Break a Strike*, which described in detail the plans and methods used by Carrier and others to oust Local 5895 as the collective barghining representative for the production and maintenance employees, and thereby deprived plaintiffs of their valuable rights.

Claims vs. Carrier:

The complaint charges Carrier with:

(1) breaching the collective bargaining agreement,

(2) ousting Local 5895 as collective bargaining representative, by a campaign of industrial warfare culminating in the withdrawal of Local 5895's charter on November 30, 1961,

(3) libeling and slandering the plaintiffs and other members of Local 5895,

(4) violating plaintiffs' rights under the Bill of Rights of the Labor Management Reporting and Disclosure Act (29 U.S.C.A. 411 et seq.), and

(5) of acting in concert with Sheet Metal Workers Local 527 and International to continuously blacklist the plaintiffs from May 1960 to the present time.

Claims Against Sheet Metal:

The complaint charges Sheet Metal with:

(1) breaching the contract among the International Unions,

(2) libeling and slandering the plaintiffs in consort with Carrier,

(3) blacklisting plaintiffs from the middle of May 1960 to the present time,

(4) maliciously interfering with plaintiffs' property rights in a campaign of industrial warfare, in consort with Carrier, against the plaintiffs from May 1960 and continuously thereafter.

Claims Against Steelworkers:

The complaint charges Steelworkers with:

(1) breaching the contract embodied in the Charter and By-laws granted to Local 5895 by Steelworkers International,

(2) violating the rights of the plaintiffs under the Bill of Rights of the Labor Management Reporting and Disclosure Act (29 U.S.C.A. 411 et seq.),

(3) aiding and abetting Carrier Corporation in the commission of unfair labor acts within the meaning of 29 U.S.C.A. § 158 (§ 8 of the National Labor Relations Act),

(4) breaching their duty of fair representation.

Conspiracies:

The complaint charges *all* of the defendants with conspiring to commit the wrongs and interferences with plaintiffs' alleged rights which are charged substantively against the various defendants.

MOTIONS TO DISMISS

Diversity Jurisdiction:

Although alleged as a jurisdictional base, it has been conceded by plaintiffs on oral argument that diversity jurisdiction under 28 U.S.C.A. § 1332, does not exist,[6] as, in fact, it does not. *United Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965).

29 U.S.C.A. § 412 Jurisdiction:

Under the above section, the District Court is given jurisdiction over actions brought by union members to vindicate a violation of the rights guaranteed them under the "Bill of Rights of Members of Labor Organizations," (29 U.S.C.A. §411 et seq.). The Bill of Rights deals with the internal political rights of union members within, and in relation to, the union as set forth therein. *Hill* v. *Avo Corporation*, 275 F.Supp. 482, 489 (N.D. Ohio 1967); *Cox* v. *Hutcheson*, 204 F.Supp 442 (S.D. Ind. 1962); *Allen* v. *Armored Car Chauffeurs*, 185 F.Supp. 494 (D.N.J. 1960); *Strauss* v. *International Brotherhood of Teamsters*, 179 F. Supp. 297, 300 (E.D.Pa. 1959).

> The uniform current of authority in this Circuit has been to limit the jurisdiction of the District Courts under the Labor-Management Reporting and Disclosure Act to suits based upon allegations that a labor

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[6] Transcript of argument on the motion to dismiss for failure to comply with Rule 8, F.R.Civ.P.—September 12, 1966, p. 24.

organization or officer or agent thereof acting in his official capacity violated the terms of the Act. Thus it has been consistently held that the Labor Management Reporting and Disclosure Act regulates *only the relationship between the union and its members* and not that between an employer and his employees. (Emphasis added).

Thompson v. *New York Central Railroad Company*, 361 F.2d 127, 145 (2d Cir. 1966).

The rights afforded union members under these sections are: the right to vote in elections, to nominate candidates, to participate in the deliberation of issues; the right to freedom of speech and assembly; the right to participation in the fixing of dues, initiation fees and assessments; protection of the right to sue; the right to due process in disciplinary actions resulting in fine, suspension, or other discipline; and the right to obtain copies of the collective bargaining agreement.[1]

§412 *Jurisdiction Re Carrier*

The plaintiffs base one of their claims against Carrier upon allegations that Carrier violated plaintiffs' rights under subchapter 2 of the Labor Management Reporting and Disclosure Act, Bill of Rights of Members of Labor Organizations (29 U.S.C.A. §411 et seq.). This Court lacks jurisdiction over this claim, since the *Bill of Rights* does not govern relationships "between an employer and his employees." *Thompson* v. *New York Central Railroad Company*, 361 F.2d at 145.

Defendant Carrier's motion to dismiss as to this claim should be granted for lack of jurisdiction and failure to state a claim upon which relief can be granted.

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[1] § 101 and 104 Labor Management Reporting and Disclosure Act (29 U.S.C.A. § 411 and 414).

§412 Jurisdiction Re Steelworkers

Asserting 29 U.S.C.A. §412 as the jurisdictional base, the complaint alleges violations of the *Bill of Rights* on the part of the Steelworkers in the same conclusory manner as alleged against Carrier, except that reference is made to paragraph VII of the complaint.

The plaintiffs fail to point out the allegations of paragraph VII relied upon to support the charge, and an examination by this Court has failed to find pertinent allegations. This complete lack of specificity defeats plaintiffs' claim.

> It may be argued that only general allegations are required to state a claim for relief under the statute (LMRDA) . . . [w]e believe, however, that claims under Title I of the Labor Management Reporting and Disclosure Act must be stated with much greater specificity than alleged by the plaintiff in this action and that if claims are not *so specific as to show a clear infringement*, the complaint is defective. (Bracketed and emphasized material added.) *Scoville* v. *Watson*, 338 F.2d 678, 681 (7th Cir. 1964) *cert. denied* 380 U.S. 963 (1965).

Accord: *Cornelio* v. *Metropolitan District Council*, 358 F.2d 728 (3rd Cir. 1966) *cert. denied* 386 U.S. 975 (1967).

The court in *Green* v. *Local 705, Hotel & Restaurant Employees*, 220 F. Supp. 505, 507 (E.D.Mich. 1963) aptly described the situation when it said:

> Title I is not a 'catch all' into which disgruntled members my sweep all manner of miscellaneous charges. It is a specific section for the enforcement of specific rights, the violation of which is not even here reasonably or properly (or, in my judgment, intended to be) alleged.

The defendant Steelworkers' motion to dismiss claims based upon alleged violations of the *Bill of Rights* (29 U.S.C.A. §411 et seq.), should be granted for lack of jurisdiction and failure to state a claim upon which relief can be granted.

§412 Jurisdiction Re Sheet Metal

"Apparently recognizing that the plaintiffs have no rights secured to them under the *Bill of Rights* as against defendants Sheet Metal, they assert no such claim, but they charge that the alleged Carrier violation of the *Bill of Rights* referred to above, was an object of the conspiracy which is asserted against all of the defendants. This does not afford §412 jurisdiction. *Cole* v. *Hall*, 35 F.R.D. 4, 8 (E.D.N.Y. 1964). See: *Hall* v. *Pacific Maritime Association*, 281 F.Supp. 54, 61 (N.D.Cal. 1968).

29 U.S.C.A. §185 Jurisdiction:

§301(a) Labor Management Relations Act (29 U.S.C.A. §185 (a)) provides:

> (a) Suits for violation of contracts *between an employer and a labor organization* representing employees in an industry affecting commerce as defined in this chapter, *or between any such labor organizations*, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. (Emphasis added).

§185(a) Jurisdiction Re Carrier

The basis for jurisdiction against Carrier under this section is alleged in paragraph VIII(a) of the complaint as follows: "Carrier Corporation deliberately and maliciously breached the Collective Bargaining Agreement to the damage of the Plaintiffs."

While it does not appear that the "Collective Bargaining Agreement" alleged to have been breached, was in force at the pertinent time, the complaint is further deficient as a *pleading;* hence, the claim against Carrier alleged in paragraph VIII(a) of the complaint for breach of contract, should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted. Plaintiffs fail to point out exactly *how* the contract has been violated, or *which* contract provisions have been breached. A complaint which pleads mere conclusory allegations of contract breach is deficient and not proper. *Kipbea Baking Co.* v. *Strauss,* 218 F.Supp. 696 (E.D.N.Y. 1963); *Oil, Chemical & Atomic Workers* v. *Delta Refining Co.,* 277 F.2d 694 (6th Cir. 1960); *Local 207, United Electrical Workers* v. *Landers, Frary & Clark.* 119 F.Supp. 877 (D.Conn. 1954); *Reed* v. *Fawick Airflex Co.,* 86 F.Supp. 822 (N.D.Ohio 1949); *Local 735 United Electrical Workers* v. *Harris-Seybold Co.,* 8 F.R.D. 422 (N.D. Ohio 1948). "[T]he plaintiffs [should be] able to point to specific provisions of their collective bargaining agreement, the breach of which constitutes the real essence of their suit." *Chasnis* v. *Progress Manufacturing Company,* 256 F.Supp. 747, 752-53 (E.D.Pa. 1966). Accord: *Alexander* v. *Pacific Maritime Association,* 314 F.2d 690 (9th Cir. 1963) *cert. denied* 379 U.S. 882 (1964); *Woody* v. *Sterling Aluminum Products, Inc.,* 244 F.Supp. 84, 87-88 (E.D. Mo. 1965) *aff'd* 365 F.2d 448 (8th Cir. 1966).

It can be argued that a fine-tooth-combing and liberal interpretation of the complaint would disclose enough allegations to obviate lack of specificity as a grounds for dismissal. Even such an interpretation would require dismissal of the breach of contract claim made under §301.

The plaintiffs contend that it is the breach of the "collective bargaining agreement described in paragraph

VII(e) and (f) of the Amended Complaint"[8] which supports §301 jurisdiction. It can be deduced that the earliest breach of the contract complained of,[9] while not specifically set forth as such in the complaint, is alleged as occurring in February 1960.[10]

The contract on which the plaintiffs rely was renewed September 30, 1959, by its own terms,[11] unless notice of cancellation was given by either party thereto. There are no allegations that either party gave the required notice. Under ordinary circumstances, the self-executing provision of the contract would result in its renewal for a three-year period as alleged by the plaintiffs. *Food Handlers Local 425* v. *Arkansas Poultry Cooperative, Inc.*, 199 F.Supp. 805 (W.D.Ark. 1961); *N.L.R.B.* v. *Local 300, International Hod Carriers*, 287 F.2d 605 (9th Cir. 1961); *Lewis* v. *Mearns*, 168 F.Supp. 134 (N.D.W.Va. 1958) *aff'd* 268 F.2d 427 (4th Cir. 1959).

Carrier contends that the following events, starting in May 1959, even in the absence of the required notice, prevented a renewal as a matter of law:

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[8] Plaintiffs' Memorandum in Opposition to the Defendants' Motions to Dismiss, p. 2.

[9] "The earliest breach was in 1960." *Plaintiffs' Memorandum in Opposition to the Defendants' Motions to Dismiss*, p. 12.

[10] "(q) During the middle or latter part of February 1960, defendant Carrier Corporation commenced a campaign in the newspapers, and on television and radio denouncing various proposals of the Local Union 5695." Amended Complaint, paragraph VII (q), p. 7.

[11] Section XXII(A) of the Carrier—*FLU* contract provides: *Duration of Agreement.*

(A) This Agreement shall become effective as of September 4, 1956, and shall remain in full force and effect until midnight September 30, 1959, and shall thereafter be continued for successive periods of three (3) years each, unless either party gives written notice of termination to the other party at least sixty (60) days before the end of such contract period. In the event such notice is given the terms of this Agreement shall terminate at the end of such contract period.

1. June 1959—FLU membership votes to affiliate with an international union.

2. July 1959—FLU membership votes to affiliate with Steelworkers International.

3. October 1959—a new charter is issued to Steelworkers Local 5895, replacing the revoked FLU charter.

4. January 1960—Steelworkers Local 5895 is certified by the N.L.R.B. as the exclusive bargaining representative of the production and maintenance workers at Carrier's Syracuse plants.

No case directly in point has been cited by counsel, or found by the court to support this position. However, good sense and cases in the area lend validity to it.

Assuming, arguendo, that the inaction of FLU and Carrier during the period prior to August 2, 1959, resulted in a renewal of the contract, the certification on January 15, 1960, of Steelworkers Local 5895 as exclusive bargaining representative and its subsequent "proposals" [18] to Carrier in such capacity, terminated any subsisting contract.

The membership of FLU received a charter from Steelworkers International on October 2, 1959. On January 15, 1960, Local 5895 became the sole representative with whom Carrier could bargain and in fact did bargain. Bargaining can not be, and as a matter of labor policy is not, hamstrung by contracts negotiated by the replaced bargaining representative. *Matter of American Seating Company*, 106 N.L.R.B. 44 (1953). If the old contract endured and regulated the actions of the parties, then there would be no incentive for either party to agree to any less favorable terms than those in the old contract.

American Seating concerned the effect a new certification had upon an existing collective bargaining contract. It held that such a contract may not stand as a bar to full

[18] See fn. 10.

statutory collective bargaining as to any group of employees in an appropriate unit covered by such contract, upon the certification of a new collective bargaining representative for that unit of employees. The Board justified their decision because, to hold otherwise, a certified bargaining representative might be deprived of effective statutory power as to the most important subjects of collective bargaining for an unlimited number of years as the result of an agreement negotiated by an unwanted and repudicated collective bargaining representative. The Board held that there is no provision in the statute for this kind of emasculated certified bargaining representative, and that there is a little point in selecting a new bargaining representative which is unable to negotiate new terms and conditions of employment for an extended period of time.

The use of this unlimited bargaining power by the newly certified bargaining agent, effectively puts an end to the old contract.

Implicit in the contract with FLU, is the condition that its enforcibility depends on FLU's continuance as the certified collective bargaining representative. It's status as such ceased no later than January 15, 1960, upon Steelworker's certification by the N.L.R.B. See: *Employees* v. *Westinghouse Corporation*, 348 U.S. 437, 451 (1955); *Retail Clerks International Association* v. *Montgomery Ward & Co.*, 316 F.2d 754, 757 (7th Cir. 1963); *Smith Steel Workers* v. *A.O. Smith Corporation*, 285 F.Supp. 1011, 1016 (E.D.Wis. 1968).

To effectuate a termination of the contract required notice to that effect by Carrier or FLU before August 2, 1959. At that time a real question of representation had developed.[18] Under these circumstances, Carrier was re-

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[18] A petition for a representative election was filed on May 15, 1959—*Carrier Brief* dated April 3, 1967, p. 2 and see: *Amended Complaint*—paragraph VII (i), (j), (k), (l), (m), (o); paragraph IX (a)(1), (b)(2); paragraph XV.

quired to maintain a strict neutrality until the question of representation was resolved by the N.L.R.B. *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060 (1945); *Shea Chemical Corporation*, 121 NLRB 1027 (1958); *Empire State Sugar Company, Inc.*, v. *N.L.R.B.*, 401 F.2d 559 (2d Cir. 1968); *St. Louis Independent Packing Company* v. *N.L.R.B.*, 291 F.2d 700, 704 (7th Cir. 1961); *Southern Conference of Teamsters* v. *Red Ball Motor Freight, Inc.*, 374 F.2d 932 (5th Cir. 1967); *Boyle's Famous Corned Beef Company* v. *N.L.R.B.*, 400 F.2d 154, 171-172 (8th Cir. 1968). Consequently, the failure to give notice of termination does not indicate an intention to renew. Renewal under such circumstances would be considered an unfair labor practice as a breach of the employer's duty of neutrality, resulting in unenforcibility of the renewed contract. *Empire State Sugar Company, Inc.* v. *N.L.R.B.*, 401 F.2d 559 (2d Cir. 1968); *St. Louis Independent Packing Company* v. *N.L.R.B.*, 291 F.2d 700 (7th Cir. 1961).

It would be unseemly for this Court to give force and effect to an agreement which the N.L.R.B., the body charged with exercising its expertise in this field, would not. Following the lead of the N.L.R.B., the facts alleged are insufficient to establish the effective renewal of the contract.

Assuming a renewal of the contract on October 1, 1959, the contracting party FLU ceased to exist and was replaced as representative of the plaintiffs on the next day by Steelworkers Local 5895, a party with whom Carrier had no contractual relation, and who had not assumed the obligations of the contract.[14] It is the Steelworkers through

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[14] Compare: Section XXI(A) of the Carrier—FLU contract provides:

(A) The Employer agrees that it will not take any steps, legal or otherwise, to alter its existence for the purpose of avoiding this Agreement. Nevertheless, this Agreement shall not prohibit any corporate changes, nor the creation of a new corporation provided such new corporation assumes any obligations of the Employer required under this Agreement.

whom the plaintiffs' claim to derive the rights they allege were violated, but the Steelworkers' Local 5895 was not a party to any contract with Carrier at the time of the breaches alleged. If the contract be interpreted so as to substitute Steelworkers for FLU, the plaintiffs should not be permitted enforcement of its provisions since strict neutrality deprived Carrier from exercising its right to terminate.[15]

Carriers' motion to dismiss claims based on alleged violations of the FLU-Carrier Corporation Bargaining Agreement should be granted for lack of jurisdiction and failure to state a claim upon which relief can be granted.

§ 185(a) Jurisdiction Re Sheet Metal

§ 301 L.M.R.A. 29 U.S.C.A. § 185(a) is the jurisdictional base alleged to support the claims charging Sheet Metal with violating the *Agreement Among the Internationals.* §12 of that Agreement provides:

> When an International Union is chosen to represent the members of the Carrier Corporation, the other International Unions signator to this Agreement will not intervene or be a party to any National Labor Relations Board Election.

This provision constitutes a no-raiding agreement. The enforcibility of such a provision lacks unanimity in the courts. *Compare: International Union* v. *Metal Polishers,* 180 F.Supp. 280 (S.D.Cal. 1960); *Local 33, International Hod Carriers* v. *Mason Tenders,* 186 F.Supp. 737 (S.D. N.Y. 1960) *aff'd* 291 F.2d 496 (2d Cir. 1961) *with:*

United Textile Workers v. *Textile Workers Union,* 258 F.2d 743 (7th Cir. 1958); *Local 2608, Lumber & Sawmill*

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[15] Section XXI(B) of the Carrier—FLU contract provides:

(B) If the Union shall change its existence or shall join or affiliate with some other organization, the Employer then or thereafter shall have the option to terminate this Agreement.

Workers v. *Millmen's Local*, 169 F.Supp. 765 (N.D.Cal. 1958); *International Association of Machinists* v. *International Brotherhood of Firemen & Oilers*, 234 F.Supp. 858 (N.D.Ga. 1964).

The position of Judge Mathes, as expressed in *International Union* v. *Metal Polishers, supra*, at 286-87, that such a contract is not within the contemplation of §301 and does not supply a base for jurisdiction under that section, is more convincing than the contrary holding of *United Textile Workers* v. *Textile Workers Union, supra*. Judge Mathes' reasoning has been followed in this circuit by Judge Ryan in *Local 33, International Hod Carriers* v. *Mason Tenders, supra*, and has met with favor by Judge Medina in the affirmance of *Local 33, International Hod Carriers* v. *Mason Tenders*, 291 F.2d 496, 502-03 (2d Cir. 1961).

Local 2608, Lumber & Sawmill Workers v. *Millmen's Local, supra*, followed *United Textile Workers* v. *Textile Workers Union, supra*, with "considerable reservation." 169 F.Supp, at 768.

Sheet Metal's motion to dismiss claims against it based upon alleged breaches of the *Agreement Among the Internationals*, should be granted for lack of jurisdiction.

§185(a) Jurisdiction Re Steelworkers

Plaintiffs contend that §301 L.M.R.A. (29 U.S.C.A.. § 185(a)), provides a jurisdictional base for the claim set forth in paragraph X (a) of the complaint. There it is alleged that defendant Steelworkers International, "breached the contract created by the *charter* and by-laws granted to Local Union No. 5895." The complaint also alleges that a copy of the charter is attached to the complaint.[10] It is

[10] Steelworker's brief includes the text of a standard form charter which reads:

"This charter of affiliation with all of the rights and privileges appurtenant thereto is granted upon the condition that the United Steelworkers of America Local Union shall at all times comply with

not. The complaint does, however, allege the terms of the charter and the breaches thereof, and at this juncture these must be accepted as fact. This may be attributing to the complaint greater compass than the plaintiffs intended.[17]

Treating the allegations of the complaint in the most favorable light, it cannot be said that they do not allege the breach of the kind of contract with which § 301 was meant to deal.[18] However, the correctness of this statement is doubtful and far from clear.

In the complaint, the plaintiffs find no fault with the conduct of Local 5895, their certified collective bargaining representative.[19] It is alleged that the wrongs done emanated from the conduct of Steelworkers *International*. The plaintiffs have failed to allege in their complaint that Local 5895 ever refused to assert against either Carrier or Steelworkers

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the rules, regulations and laws for Local Unions duly adopted by the United Steelworkers of America. So long as this condition shall be duly performed in all respects, the United Steelworkers of America does hereby agree to promote and assist the said Local Union in the exercise of all rights and privileges hereunder."

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[17] "The Amended Complaint alleges facts which support claims for: (1) breach of the collective bargaining contract by Defendant Carrier Corporation; (2) breach of the duty of fair representation by Defendant Steelworkers International; (3) breach of the duty of fair representation by defendants Sheet Metal Workers International and Local No. 527; and (4) participation by Defendant Carrier Corporation in the breaches of the Defendant unions duty of fair representation, either as co-conspirator or joint tort-feasor." *Plaintiffs' Brief in Reply to Defendants' Memorandums in Support of Their Motions to Dismiss*, p. 2.

[18] It is interesting to note, however, that no case has been cited by plaintiffs and none has been found, basing § 301 jurisdiction upon an alleged violation of the provisions of a *charter* granted from an international to a local, as distinguished from a constitution.

[19] *Section 4. Article VII, Constitution of International Union—United Steelworkers of America* provides:

"The Local Unions shall be charged with the duty of enforcing this Constitution as affecting their membership."

International, any rights derived from a *charter* or a collective bargaining contract. Before Steelworkers International should be subjected to suit by individual members under a charter granted to a local, it should be at the very least alleged that the local, after proper demand, has *internally* refused to vindicate the rights of the aggrieved members or that such remedy is unavailable or would be fruitless. *Cf.: Desrosiers* v. *American Cyanamid Company*, 377 F.2d 864 (2d Cir. 1967); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

A failure by an employee to petition his local to pursue available internal grievance machinery against an employer, unless such failure results from the fact that the local is hostile to the employee or in league with the employer, will insulate the employer from a §301 action brought against it by an individual union employee for alleged violations of a collective bargaining agreement. Steelworkers International should be cast in no less a favorable a position vis a vis an individual union member of one of its locals. *Cf.: Desrosiers* v. *American Cyanamid Company*, 377 F.2d 864 (2d Cir. 1967); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

Steelworkers' motion to dismiss the claims against it based upon alleged breaches of the charter and by-laws should be granted for failure to state a claim upon which relief can be granted.

Preempted Claims:

Although paragraph X(d) of the complaint (directed against Steelworkers International) is the only claim specifically alleging unfair labor practices in violation of 29 U.S.C.A. §159, a fair reading of the claims set forth in paragraphs VIII(e) (directed against Carrier) and IX(e) (directed against Sheet Metal) indicate an attempt to allege the same or similar conduct. As such, these claims

allege what are arguably unfair labor practices and thus are preempted to the exclusive jurisdiction of the National Labor Relations Board under the rule of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

Paragraphs VIII(e) (directed against Carrier) and IX(d) (directed against Sheet Metal) charge those parties with *blacklisting* the plaintiffs. Blacklisting is an activity which is arguably subject to either or both §§7 & 8 of the National Labor Relations Act, and as such, these claims are also preempted to the exclusive jurisdiction of the N.L.R.B. under the *Garmon* rule. See: *Local 100, United Association of Journeymen & Apprentices* v. *Borden*, 373 U.S. 690 (1963), and *Local 207, Iron Workers Union* v. *Perko*, 373 U.S. 701 (1963).

Further, the paragraphs of the complaint discussed above (paragraphs VIII(c) & (e), IX(e) & (d) and X(d) would in any case only allege state cause of action. As such, this court would not exercise pendent jurisdiction over them in a case with a posture such as this one.

The motions to dismiss the claims set forth in paragraphs VIII(c) & (e), IX(e) & (d), and X(d), should be granted for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

Duty of Fair Representation Claim:

If the plaintiffs are attempting to allege breach of the duty of fair representation against Steelworkers International in paragraphs VIII(b)(5); IX(b)(8); X(b)(1), (2), (3) and X(d), then any cause of action against Steelworkers International arising from the breach of the duty of fair representation, will be time-barred by the applicable *New York* statute of limitations. *United Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

The duty of fair representation is a statutory obligation imposed upon a union; and arising when a union is selected as the exclusive bargaining representative for a group of

workers. It is a duty that flows from the relationship between the exclusive bargaining representative and those represented and is established by the national labor statutes; i.e., the duty of fair representation exists because the exclusive bargaining representative occupies a certain status in relation to the workers it represents. If the union's status as exclusive bargaining representative terminates, and it is replaced as such by another union, then the duty of fair representation also ceases. See: *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944). Steelworkers duty of fair representation ceased on November 30, 1961, when they were replaced by Sheet Metal Local 527 as the exclusive bargaining representative of the production and maintenance workers at Carrier's Syracuse plants.

The duty of fair representation is a fiduciary obligation. *Brady* v. *Trans World Airlines, Inc.* 401 F.2d 87, 94 (3rd Cir. 1968); *Falsetti* v. *United Mine Workers*, 249 F.Supp. 970 (W.D.Pa. 1965); *aff'd* 355 F.2d 658 (3rd Cir. 1966); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 201 (4th Cir. 1963); *International Union of Electrical Workers* v. *N.L.R.B.*, 307 F.2d 679, 683 (D.C. Cir.) *cert. denied* 371 U.S. 936 (1962); *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 275 F.Supp. 292, 307 (E.D.Pa. 1967); *Falsetti* v. *United Mine Workers*, 34 F.R.D. 461, 462 (W.D.Pa. 1964). A cause of action in New York to recover damages for breach of fiduciary obligations is governed by the three (3) year statute of limitations provided by C.P.L.R. §214(4) formerly C.P.A. §49(7). *Dinerman* v. *Sutton*, 45 Misc.2d 791, 258 N.Y.S. 2d 13 (Sup.Ct. 1965); *Tobias* v. *Celler*, 37 N.Y.S. 2d 399 (Sup. Ct. 1942) *aff'd* 265 App.Div. 1065, 39 N.Y.S.2d 1020 (2d Dept. 1943); *Virginia Iron, Coal & Coke Company* v. *Brown*, 37 Misc.2d 347, 238 N.Y.S.2d 298 (Sup. Ct. 1962) *aff'd* 18 App.Div.2d 996, 238 N.Y.S.2d 727 (1st Dept. 1963); *Velaise* v. *Sheresky*, 9 Misc.2d 278, 169 N.Y.S.

2d 380 (Sup. Ct. 1957) *aff'd* 7 App.Div.2d 719, 181 N.Y.S.2d 165 (1st Dept. 1958).

The cause of action for breach of the duty of fair representation accrued when the plaintiffs knew or should have known that they were not being fairly represented. *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 275 F.Supp. 292, 307 (E.D.Pa. 1967); *Falsetti* v. *Local 2026, United Mine Workers*, 249 F.Supp. 970, 973 (W.D.Pa. 1965) *aff'd* 355 F.2d 658 (3rd Cir. 1966). In the instant case, the plaintiffs knew or should have known that they were not being fairly represented at least by November 30, 1961. On that date Steelworkers was replaced by Sheet Metal Local 527 as the exclusive bargaining representative of the production and maintenance workers at Carrier's Syracuse plants. On that date, the duty of fair representation owed by Steelworkers ceased, as a matter of law, when they were replaced by Sheet Metal, as the duty is not a continuing one. *Falsetti* v. *United Mine Workers*, 249 F.Supp. 970, 973 (W.D.Pa. 1965) *aff'd* 355 F.2d 658, 662 (3rd Cir. 1966); *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 275 F.Supp. at pp. 307 & 308. See: *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944). Plaintiffs knew or should have known these facts, and, in fact, the complaint itself demonstrates the importance and significance of the date November 30, 1961, as it claims that Steelworkers abandoned the plaintiffs on November 30, 1961, "such abandonment *being complete* . . ." Amended Complaint, paragraph X(a), p.17. (Emphasis added).

Plaintiffs cause of action accrued on November 30, 1961 at the latest, but their original summonses and complaints were not filed until January 29, 1965 and March 1965, therefore the cause of action is barred by the statute of limitations and defendant Steelworker's motion to dismiss this claim should be granted.

Plaintiffs' Second Cause of Action:

In paragraph XIV the plaintiffs reallege each and every allegation contained in paragraphs I-VII and XI-XIII, which paragraphs constitute the entire preceding complaint except for the paragraphs specifically charging allegations against Carrier, Sheet Metal and Steelworkers International, i.e., paragraphs VIII-X.

Paragraph XV simply charges the defendants with having a bad motive, without more. This, of course, fails to state a cause of action.

Paragraph XVI, construed most favorably to the plaintiffs, realleges the previously alleged claims based upon breach of the duty of fair representation, breach of the alleged collective bargaining contract, and conduct constituting unfair labor practices. The breach of the duty of fair representation claim has been dealt with earlier in this decision at pages 23-25; the claim based upon breach of an alleged collective bargaining contract was dealt with on pages 12-18. The conclusions reached earlier as to these causes of action are reaffirmed, insofar as they relate to plaintiffs' Second Cause of Action. Claims alleging conduct constituting unfair labor practices are preempted to the exclusive jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

For the reasons given above, plaintiffs' Second Cause of Action is dismissed pursuant to the motion of all the defendants, for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

State Claims against the Defendants:

Paragraph VIII(b)(1)-(7), paragraph IX(b)(1)-(8), and paragraph X(b)(1)-(3) allege conspiracies against Carrier, Sheet Metal and Steelworkers respectively, charging that they conspired with each other and others un-

known to accomplish ends detrimental to the plaintiffs. Paragraph VIII(d) charges Carrier with the libel of plaintiffs, and a similar allegation is made against Sheet Metal in paragraph IX(e). Since the federal claims found in this complaint have all been dismissed, and there is no substantial federal claim, the court declines in its discretion to exercise pendent jurisdiction over these state causes of action. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725-726 (1966); *Yanity* v. *Benware*, 376 F.2d 197, 201 (2d Cir. 1967).

For the reasons herein, it is

ORDERED that each of the defendants' motion to dismiss the Amended Complaint in both of the above entitled actions, be and the same hereby are granted, and it is further

ORDERED that the Clerk enter judgment dismissing the Amended Complaint.

EDMUND PORT
United States District Judge

Dated: December 31, 1968
Auburn, New York

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[redacted]

[redacted]

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STATEMENT OF THE CASE

This is an action instituted on January 29, 1965 by the respondents, 225 individuals, formerly employed at the Carrier Corporation Syracuse New York Plant. The suit seeks compensatory and punitive damages against Carrier Corporation, United Steelworkers of America, AFL-CIO, Sheet Metal Workers' International Association, AFL-CIO and its Local 527, based upon allegations growing out a labor relations imbroglio which occurred during the years 1959 and 1960 at said plant (App. 1-3). No Answer has been filed by any of the defendants in this suit, nor have any pretrial discovery proceedings occurred. Pursuant to the opinion of the United States Court of Appeals for the Second Circuit, plaintiff was permitted to file a further amended complaint within 30 days from the issuance of the Second Circuit's judgment and mandate (App. 34). It has been filed. For the first time responsive pleadings directed to the allegations of the complaint, as distinguished from motions to dismiss the complaint on its face, will be filed by the defendants.

The nature of the cause of action against the defendants relates to a certain series of events which occurred in the years 1959-1960 at the Carrier Plant in Syracuse, New York (App. 1).

Plaintiffs for sometime prior to March 2nd, 1960 were employed as hourly production and maintenance workers by Carrier at its plant in Syracuse, New York. Some 20 years prior, the employees of Carrier had organized into an unincorporated association known as the "Carrier Employees Association" with the general purpose of the association being those usually performed by a labor union. Thereafter the Carrier Employees Association affiliated with

the American Federation of Labor and became known as Federal Labor Union No. 23983 directly affiliated with the American Federation of Labor. Over the course of the years, that union entered into successive collective bargaining agreements with Carrier (App. 3, 37).

On November 8th, 1956 the Federal Labor Union and Carrier entered into a collective bargaining agreement to become effective September 4th, 1956. This contract provided that it would remain in force for three years from its effective date and that it would be extended for an additional three year period unless one of the parties gave notice of termination prior to September 30th, 1959. No notice of termination of the contract was given prior to said date and it was extended for an additional three year period (App. 3 - 4).

Subsequent to the execution of the contract, the American Federation of Labor and the Congress of Industrial Organizations merged, with the Federal Labor Union continuing as an affiliate of the AFL-CIO. On June 21st, 1959, representatives of the parent AFL-CIO held meetings with the Federal Labor Union at which time the representatives of the Federal Labor Union voted to affiliate with an international union of the AFL-CIO rather than to remain a directly chartered local union. As a result of the vote to affiliate, a number of international unions attempted to enlist the affiliation, among them being defendants Steel Workers and Sheet Metal Workers International. The election was held on July 1st, 1959 and the majority vote favored affiliation with Steel Workers. Thereafter on October 2nd, 1959 a charter was issued to the Federal Labor Union by the Steel Workers, with Federal Labor Union becoming designated as Local Union 5995 United Steel Workers of America, AFL-CIO. On January 7th,

1960 Steel Workers Union 5995 was duly elected and certified on January 15th, 1960 as the "successor collective bargaining representative under the collective bargaining agreement heretofore alluded to executed in 1956 and renewed by its very terms in September of 1959" (App. 4).

Commencing in and about the month of February, 1960, Carrier began a campaign designed to degrade and undermine the members of Local Union 5995 of the production and maintenance workers of Carrier. It attempted to have its employees work a 12 hour day in order to stock pile inventories in the event of a lockout or strike. The local in a duly constituted vote refused to work overtime and to walk out if any member was disciplined for this refusal. On March 2nd, 1960 Carrier in a televised press conference announced the reprimand of five officers of the local union. These reprimands were unjustified and in complete violation of the collective bargaining agreement. On March 3rd, 1960 Carrier closed its plant and locked out all its employees again in complete violation of the collective bargaining agreement in force between the parties. Picketing ensued with Carrier continuing its course of propaganda to alienate the members of Local 5995 from its leadership (App. 3 - 4).

Various legal proceedings before the National Labor Relations Board and the Courts thereafter occurred with negotiation concerning the lockout and work stoppage culminating in an oral agreement for a return to work (App. 4). This oral agreement, although accepted by the members of the local union, was violated and abrogated by the actions of Carrier. The picketing continued (App. 4).

On March 28th, 1960 Carrier announced it would take back anyone that wanted to go back to work and would give police protection. Thus the beginning of Carrier's

campaign to induce production and maintenance workers to abandon the local union and discontinue the strike. Picketing however, did continue as approximately 400-500 members of the local union remained on the picket lines. Next Carrier announced that those persons who were still " out on strike" must return to work or their jobs would be filled. Contrary to the collective bargaining agreement between the parties and the rights vested in the plaintiffs and others similarly situated, Carrier replaced plaintiffs and refused to permit plaintiffs to the present date to resume their employment under the same terms and conditions of employment and have blacklisted plaintiffs in the entire Syracuse area (App. 5). The events continued when on November 30th, 1960, Steel Workers withdrew as a representative of the plaintiffs and refused to intercede in their behalf. At that time the defendant Sheet Metal Workers Local 527 became the collective bargaining agent of the production and maintenance employees at Carrier (App. 5).

The essence of the claims for relief against the various defendants as summarized by the Second Circuit are:—

"Claims Against Carrier

> (1) Breach of the bargaining agreement under §301; (2) ousting Local 5895 as the bargaining representative through a campaign of industrial warfare resulting in the withdrawal of Local 5895's charter on November 30, 1961; (3) libel and slander of appellants; (4) violation of appellants 'rights under the "Bill of Rights" provisions of the LMRDA; and (5) acting in concert with Sheet Metal Workers and Local 527 to blacklist appellants to thwart their employment from May, 1960 on.

Claims Against Steelworkers

(1) Breach of contract embodied in the charter and by-laws granted to Local 5895 by Steelworkers under §301, in that Steelworkers failed to represent appellants diligently, fairly, and in good faith in proceedings before the court and the NLRB arising out of the industrial strife precipitated by the March 2, 1960 lockout by Carrier, and failed to afford to the Local 5895 membership the benefits of the funds available to the International Union to assist local unions in their industrial problems with management, and abandoned appellants and other members of Local 5895 as the collective bargaining representative of the production and maintenance workers; (2) violation of appellants' rights under the LMRDA; (3) aiding and abetting Carrier in the commission of unfair labor practices within the meaning of §8 of the National Labor Relations Act, 29 U.S.C. §158; and (4) breach of Steelworkers' duty of fair representation.

Claims Against Sheet Metal Workers and Local 527

(1) Breach of the "Agreement Among the Internationals" under §301; (2) libel and slander of appellants; (3) blacklisting appellants to thwart their employment from May, 1960 on; (4) malicious interference with appellants' property rights in a campaign of industrial warfare in concert with Carrier for appellants' loyalty to Local 5895; and (5) wrongful denial of membership in Local 527 (charged in the chronology of events but not under the heading of "wrongdoing").

Claims Against All Defendants

(1) Conspiracy to commit the above wrongs and interferences with appellants' rights charged substantively against the various defendants, and (2) deliberate ouster of appellants from union membership and job employment." (App. 6-7).

The District Court dismissed the Complaint against all defendants principally on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted (App. 35 et seq.). On appeal, the United States Court of Appeals for the Second Circuit reversed and sustained the complaint against the defendant Carrier and defendant Steelworkers, while upholding the District Court's dismissal of the complaint against the defendant Sheet Metal Workers (App. 1 et seq.). It directed plaintiffs to file a further amended complaint and directed the action proceed in accordance with the opinion (App. 34).

The District Court opinion insofar as here relevant had held that the complaint against Steelworkers for breach of the duty of fair representation was time barred under the New York Statute of Limitations (App. 55-57). Charterizing this case as one wherein a "fiduciary obligation" was involved, the District Court held that the applicable statute of limitations was a three year period of time, and, as such, the complaint was time barred (*Ibid*). The Second Circuit, in reviewing this determination, and following the guidelines of this Court's decision in *Auto Workers Union v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), characterized the entire course of events as being interrelated stating:

"The duty of the Union to its members in this regard is tied to the contractual obligations of Car-

> rier to the Union as representative of the employees and therefore resembles right-duty relationships between contracting parties, where one is bound to use good faith or its best efforts on behalf of the other. Thus the unfair representation claim against Steelworkers in this Court is intimately related to the §301 claim against Carrier since both stem from the unauthorized discharge of the appellants contrary to the terms of the labor agreement" (App. 29).

Turning to the characterization of these facts, the Court held them to be contractual in nature and applied the six year limitation as set out in New York CPLR Section 213 (2), which governs "an action upon a contractual obligation or liability express or implied" (App. 30). It is this determination that Steelworkers seeks to have this Court review at this preliminary interlocutory juncture of the case.

REASONS FOR NOT GRANTING THE WRIT

The case at bar does not involve a question of important labor policy required to be answered by this Court. This is particularly true in a case such as this where the action has not been tried, no answer has been filed, and the only pleading or evidence in the case is the amended complaint. The interlocutory and incomplete nature of this case is obvious. Certainly, if this Court is to review an issue, the full panorama of all the facts after a case is fully tried is an absolute prerequisite. In urging ripeness for review, Petitioner has set forth three grounds. It is respectfully submitted that all three lack the substantial merit required to cause this Court to exercise the extraordinary discretionary writ of certiorari.

ARGUMENT

POINT I

No important question of federal labor policy is presented in this case which requires resolution by this Court at this time.

In seeking to convince this Court that a Writ should be issued, Steelworkers contend in their first point, and again reiterated in their third point, that *Auto Workers Union v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), left unresolved for future determination the question of whether in Section 301 actions, the judiciary should devise a uniform time limitation to effectuate the federal labor policy. A review of *Hoosier Cardinal* leads to the opposite conclusion. First, in *Hoosier Cardinal*, this Court considered the question of judicially "inventing" a uniform rule of timeliness with reference to an action instituted under Section 301. Specifically this Court was asked in that case to " • • • devise a uniform time limitation to close the statutory gap left by Congress • • • ", since section 301 did not contain a limitational period. 383 U.S. at 701. In rejecting this contention, this Court reviewed the same arguments as made by petitioner herein. In fact, this Court recognized that varying results would occur in section 301 cases depending upon the individual facts, the federal characterization of those facts, and the limitational periods as set forth in state laws, stating as an initial proposition that:—

> "It is true that if state limitations provisions govern Section 301 suits, these suits will lack a uniform standard of timeliness." 383 U.S. at 701.

Then, in emphatically rejecting this argument for uniformity, the Court stated:—

> "Thus, although a uniform limitations provision for Section 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us." 383 U.S. 702-703.

Petitioner further asserts a factual difference between the 301 action in *Hoosier Cardinal* and the instant 301 suit. It is a distinction without a difference. Both are grounded in Section 301. As Justice Stewart stated in *Hoosier Cardinal*:—

> "Section 301 of the Labor Management Relations Act of 1947 confers jurisdiction upon the federal district courts over suits upon collective bargaining contracts. Nowhere in the Act, however, is there a provision for any time limitation upon the bringing of an action under §301. The questions presented by this case arise because of the absence of such a provision." 383 U.S. 697-698.
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> "It is clearly a federal question, for in 301 suits the applicable law is 'Federal Law, which the Court must fashion from the policy of our National Labor Law.'" 383 U.S. at 701.

And in fashioning that federal labor policy, later decisions by this Court have described and considered the interwoven nature of Section 301 claims against the employer a la *Hoosier Cardinal, supra,* (and the individual enforcement of those rights see *Smith v. Evening News Association,* 371 U.S. 195 (1962)) and a claim, arising out of the very same nucleus of operative facts, of breach of the duty

of fair representation against the union representing the employees at that time. This is the essential teaching of *Vaca v. Sipes*, 386 U.S. 171 (1967), and it is the *ratio decidendi* of the Second Circuit in this case in holding that the interwoven nature of the causes of actions were such that the contractual limitation must apply. *Vaca* is clear in elucidating this characterization:—

> "• • • It is obvious that the Courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many section 301 breach of contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the Court must fashion an appropriate remedy. Presumably, in at least some cases, the Union's breach of duty will have enhanced or contributed to the employees' injury. What possibly sense could there be in a rule which would permit a Court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the Court to pay for the union's wrong — slight deterrence, indeed to future union misconduct — or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employee without remedy for the union's wrong. Given the strong reason for not pre-empting duty of fair representations suits in general, and the fact that the courts in many 301 suits must adjudicate whether the union has breached its duty, we conclude that the courts may

> also fashion remedies for such a breach of duty." 386 U.S. at 187.
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> "• • • These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures time limitations, and remedial powers, must participate." 386 U.S. at 188.

This is precisely what the Second Circuit did in measuring the instant claim:—

> "In the present case appellants' claim is essentially that Steelworkers unjustifiably refused to try to enforce the rights provided for them in the labor contract with Carrier—in particular, the right not to be wrongfully discharged. The duty of the union to its members in this regard is tied to the contractual obligations of Carrier to the union as representative of the employees and therefore resembles right-duty relationships between contracting parties, where one is bound to use good faith or its best efforts on behalf of the other. Thus the unfair representation claims against Steelworkers in this court is intimately related to the §301 claim against Carrier since both stem from the unauthorized discharge of the appellants contrary to the terms of the labor agreement. Even though these are two distinct rights capable of separate vindication, see *Czosek v. O'Mara, supra*, because of their interrelated nature, it would seem appropriate to apply the same limitation period to both claims. Indeed, in proving their case against Carrier appellants will of necessity "prove that the union as bargaining agent breached its duty of fair representa-

tion in its handling of the employees' grievance." *Vaca v. Sipes, supra*, at 186, 64 LRRM 2375. Therefore the traditional argument for a short limitation period, that claimants should not be permitted to bring actions based on stale evidence long after the parties had a right to assume that the claim would not be pursued, is simply inapplicable; no matter what the disposition of the claim against the union, the claim against the employer, based on the same evidence, will still go forward. And as the Supreme Court noted in *Vaca v. Sipes, supra*, at 187, 64 LRRM 2375, there would be no sense "in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer" and again at 188, 64 LRRM 2376, fn. 12, " • • • These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, *time limitations*, and remedial powers, must participate." (emphasis added.)

"We therefore hold that when a §301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employee's grievance, the same period of limitations should be applied to both claims. In the present case, the proper limitation period to be applied to the contract claim against Carrier is the six-year limitation set out in N.Y. CPLR §213(2) for an action upon a contractual obligation or liability express or implied. *Auto Workers Union v. Hoosier Cardinal Corp., supra*, at

705-08. As this is the relevant limitation period, we hold that the claim against Steelworkers was improperly dismissed as untimely, because even the earliest date from which Steelworkers asserts the period would run, falls within the six-year limitation" (App. 28-30).

POINT II

There is no conflict between circuits with respect to the issues presented in the case at bar.

In seeking to convince this Court that conflict in the circuits exists relative to the issue presented, Steelworkers cites the case of *Fiqueroa de Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2nd 281 (1st Cir. 1970). First, it should be noted that *Trabajadores Packinghouse* was decided prior to the case at bar, and was a completed jury tried action. The instant case, in its infancy notwithstanding that the original complaint was filed over six years ago, has not even reached the stage where issues are joined by way of complaint and answer.

Secondly, the Second Circuit in this case carefully circumscribed its holding as applying solely to the federal characterization of the facts in this case, and not as providing a uniform limitational period in all cases involving fair respresentation claims. The Court studiously noted that the concept of fair representation encompassed items which can fall within the orthodox characterization of fiduciary responsibility as well as contractually grounded fair representation claims, specifically noting the teaching of *Auto Workers Union v. Hoosier Cardinal Corp., supra,*

that each case requires separate factual analysis. This is underscored by the Second Circuit's opinion footnote following the holding that the six year period of limitation applied in this case, the Court stating:—

> "It is again to be emphasized, however, that it does not follow that the limitation period for breach of contract and contract-related claims will apply to all suits brought against a union by a disgruntled member which are nominally classified within the fair representation rubric. In each instance the nature of the alleged act of commission or omission on the part of the defendant union must be examined to determine the appropriate federal characterization for statute limitations purposes. We therefore express no opinion as to whether, given allegations other than the union refusal to enforce the employers' contract rights, we might adopt the 'statutory duty' characterization of *Gray v. International Ass'n of Heat & Frost Insulators*, 418 F.2d 313, 318, 72 LRRM 2393 (6th Cir. 1969), the tort characterization of *Figueroa v. Sindicato de Trabajadores Packinghouse*, Slip Op. No. 7432, 1st Cir., April 17, 1970, 74 LRRM 2889, or some other appropriate classification." (Emphasis supplied). (App. 30, *n/n* 15).

Under these circumstance, a general statement of that a conflict in Circuits exists is inappropriate.

Moreover the characterization of the cause of action in *Trabajadores Packinghouse*, *supra*, was undoubtedly based upon the entire record and evidence in the case with the federal characterization of the cause of action therein contained being essentially tort in nature — the sole claim

relating to a question of discharge and the application of seniority to those circumstances. It does not approach by far, the complex and all encompassing events that are the subject matter of this suit. The projected proofs, it is submitted, will go much further and will show interaction a la Vaca v. Sipes, supra. The proofs await a full plenary trial.

Point III

The fashioning of a specific limitational period for causes of action such as the case at bar is not required and has been previously rejected by this Court.

In Point III of their Petition, Steelworkers seek to have this Court re-review its thinking in *Wooster Cardinal* that there is no uniform limitational provision for 301 suits, and in support thereof, renew their theme, expressed in the District Court and the Second Circuit, that a six month limitational period as in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) is appropriate. It is respectfully submitted that this Court in *Wooster Cardinal* reviewed at length the question of uniformity, clearly holding that there was no statute of limitations set forth in Section 301; that a uniform time limitation was not required by federal labor policy either to be gleaned from the statute itself or judicial fashioning; that such a result was specifically contrary to the Congressional intention in leaving a void in the legislation; and lastly recognizing that varying results would occur depending upon the federal characterization of the individual law suits and the state wherein the cause of action arose. Even the court in *Truhujulovo Parkinghouse*, supra, rejected the concept of a six month limitational period. The argument lacks merit.

CONCLUSION

Steelworkers seeks to obtain an interlocutory review in this case, which, while pending since 1965, has not even reached the stage of an answer being filed. It is respectfully submitted that this case is not ripe for review by this Court, no significant issues are presented for review, and the application for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Harold Krieger
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